Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

STEVEN H. UNTRACHT, M.D., PH.D., F.A.C.S,
Petitioner,

v.

ERDEN FIKRI, M.D., ET AL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN H. UNTRACHT, M.D.
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QUESTIONS PRESENTED

1. Does state action, as contemplated by 42 U.S.C. § 1983, apply to private conduct undertaken pursuant to mandatory governmental statute?
2. Does 42 U.S.C. § 1981 protect against discrimination by national origin?
3. Does the issuance of judicial opinions as "non-precedential" violate the Constitutional guarantee of equal protection of the laws?

COMPLETE LIST OF RESPONDENTS

Petitioner was Plaintiff/Appellant in the Courts below, whereas the Respondents were all Defendants/Appellees:

Erden Fikri, M.D.
Dinesh Mathur, M.D
Vincent Fiorica, M.D.
Terry Wahl, M.D.
David R. Davis
Sanders Ergas, M.D.
P. James Ridella, M.D.
Bhaskaran Murali, M.D.
Will H. Farthing, M.D.
Brian Gunnlaugson, M.D.
Richard Cartwright, M.D.
Denise Weisbrodt, R.N.
Richard Saluzzo, M.D.
Jacob Kolff, M.D.
Bruce Duke, M.D.
Narendra Pai, M.D.
William Fritz, M.D.
Paul Weygandt, M.D.
William M. Carney, M.D.
Harvey Slater, M.D.
George H. Benz, Jr., M.D.
Robert D. Fry, M.D.
Associated Anesthesiologists of Johnstown
UPMC (University of Pittsburgh Medical Center) Health System, Inc. ("UPMC")
UPMC Lee Regional Hospital
Lee Regional Health System, Inc.
Lee Regional Health System Foundation, Inc.
Conemaugh Health System
Memorial Medical Center.

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INTRODUCTION

This case—a shocking tale of greed, ego and even life and death among doctors, hospitals and the unwitting patients entrusted to their care—appeals to the most sacred obligations of this Court: defining the perimeters of our civil rights and assuring to every person within its jurisdiction the benefits guaranteed by the Constitution, in the words of the Chief Justice, to "uphold[] the rule of law and safeguard[] those liberties that make this land one of endless possibilities for all Americans." John G. Roberts, Jr., *Senate Confirmation Hearings,* September 12-15, 2005 (opening statement) (emphasis added).

THE OPINIONS AND ORDERS BELOW

1. *Untracht v. Fikri*, 2007 WL 2868028 (3rd Cir. (Pa.)) (Not selected for publication in the Federal Reporter) 3rd Cir. (Pa.) Oct 01, 2007. (Reproduced in the Appendix at p. 1a.)

2. *Untracht v. Fikri,* 454 F.Supp.2d 289 W.D.Pa. Aug 30, 2006. (Reproduced in the Appendix at p. 4a.)

3. *Untracht v. Fikri,* 368 F.Supp.2d 409 W.D.Pa. Apr 06, 2005. (Reproduced in the Appendix at p. 90a.)

JURISDICTION

The court of appeals entered judgment in this matter on October 1, 2007. On October 30, 2007, that court denied Plaintiff's petition for rehearing *en banc* (Pet. App. p. 105a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1981

42 U.S.C. § 1981 provides:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The Health Care Quality Improvement Act

The Health Care Quality Improvement Act of 1986, as amended 01/26/98, 42 USC §§ 11101 *et seq.* ("HCQIA"), provides in relevant part (emphasis added):

Title 42 - The Public Health And Welfare
Chapter 117 – Encouraging Good Faith Professional Review Activities

Sec. 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

. . .

Sec. 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section -

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. **The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including** the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* and **the Civil Rights Acts, 42 U.S.C.§ 1981, *et seq***. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of title 15, where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception - If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

Sec. 11133. Reporting of certain professional review actions taken by health care entities

(a) Reporting by health care entities

(1) On physicians

Each health care entity which—

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician—

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society, shall report to the Board of Medical Examiners, in accordance with section 11134 (a) of this title, the information described in paragraph (3).

. . .

(3) Information to be reported

The information to be reported under this subsection is—

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

. . .

(c) Sanctions

(1) Health care entities

A health care entity that fails substantially to meet the requirement of subsection (a)(1) of this section shall lose the protections of section 11111 (a)(1) of this title if the Secretary publishes the name of the entity under section 11111 (b) of this title.

. . .

STATEMENT OF THE CASE

A. The Health Care Quality Improvement Act and the National Practioner Data Bank

In passing the HCQIA, Congress deeply insinuated itself into hospital staff governance and explicitly bestowed on hospitals, most of which are private entities, powers theretofore exclusively reserved for the States: to declare physicians incompetent and "to restrict the ability of incompetent physicians to move from State to State" (42 U.S.C. § 11101, above). Hospitals exercise these powers through local peer review of its doctors and the reporting of consequential adverse privileging actions pursuant to 42 U.S.C. §§ 11133 and 11134. The federal government established the National Practitioner Data Bank ("Data Bank") as a central repository to receive these adverse reports.

The Data Bank operates as a blacklist. Virtually no physician entered into it can survive professionally. By law, when a physician applies for clinical privileges the hospital queries the Data Bank and the hospital refuses to admit the physician to its staff if there is an adverse entry. With hospitals fending off litigation, they have little reason to see past a black mark in the Data Bank to allow a blacklisted physician to use its facilities. A surgeon like Petitioner cannot practice his profession without hospital privileges.

B. Sham Peer Review, a Mask for Evil

Disgruntled doctors and hospital administrators all too often abuse the awesome power of HCQIA as a salve for their own personal failings, character defects and professional impotence. *See, e.g.*, Gail Weiss, *Is Peer Review Worth Saving?* Medical Economics (Feb. 18, 2005) (http://www.memag.com/memag/content/printContentPopup.jsp?id=147405); Ron Wood, *Jury says hospital defamed doctor, harmed him financially,* The Morning News (Jan. 13, 2004); John Zicconi, *Due Process or Professional Assassination?*, Unique Opportunities (March/April 2001); William W. Parmley, *Clinical Peer Review or Competitive Hatchet Job,* 36 Journal of the American College of Cardiology No. 7 (2000); David W. Townend, *Hospital peer review is a kangaroo court,* Medical Economics (Feb. 7, 2000), (http://www.memag.com/memag/content/printCotentPopup.jsp?id=122302). Respondent UPMC's own world-famous transplant surgeon, Dr. Tom Starzl, pointedly denounces these practices as "administrative murder:"

> The most bitter of these struggles occur in medical universities and hospitals, for stakes which cannot be divulged because they are too ignoble to admit. Who wants to concede that money, academic territory, vanity, or control of the talents and ideas of one's colleagues is the reason for the conflict? These motives are painted over and presented as generosity, virtue, morality, humility, institutional purpose, and concern for society in general. If one intends to permanently remove an adversary from the field of endeavor, one must do so secretly so as to avoid being accused of administrative murder—the termination of someone's professional career.[1]

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[1] Starzl, T.E., *The Puzzle People, Memoirs of a Transplant Surgeon,* University of Pittsburgh Press, 1992, p. 267.

Like anyone else, physicians and hospitals strive to maximize their "utility," including revenues, profits and ego. When abused, HCQIA and the Data Bank provide a shortcut to the pot of gold by empowering those so inclined to inflict pain and confiscate property, livelihood, career and peace of mind, all without notice, due process or repercussion. The economic incentive for abuse of peer review is obvious and undeniable. If there are a few surgeons in a market, then elimination of one them will cause the incomes of the others to increase dramatically. Similarly, if a physician blows the whistle on serious medical errors that could cost hospitals and doctors millions of dollars in malpractice liability or government fines, then the torture and ruin of that physician will dissuade other potential whistleblowers and save the errant hospitals and doctors a fortune. *See,* Steve Twedt, *The Cost of Courage,* Pittsburgh Post-Gazette, 2003 (http://www.post-gazette.com/pg/03299/234499.stm).

This growing misuse of peer review and the Data Bank has become so widespread that it has acquired a descriptive name: "sham peer review." What purports to be "peer review" under the pretext of protecting patients is really a transparent mask for evil and a fig leaf for evildoers. The incentive for misusing this power is even greater when a greedy doctor suffers a drop in income or loss of pride because he has a more successful competitor. *See, e.g.,* Jeff Chu, *Doctors Who Hurt Doctors,* Time 52 (Aug. 15, 2005) ("Th[e] system is too open to manipulation and needs reform, says the 4,000-member American Association [sic] of Physicians and Surgeons."). If a similar type of peer review were available to retail stores, then it would be in the self-interest of a struggling K-Mart to try "sham peer review" to end the competition from Wal-Mart.

A respected national organization, the Association of American Physicians and Surgeons ("AAPS") dedicates much of its resources to studying and combating this menacing problem. After a thorough review of the complete

record of the proceedings at Respondent UPMC Lee Regional Hospital ("Lee"), and after its own statistician evaluated the total clinical outcome data from 1990 through 2002 for Petitioner and his detractors for every patient that these physicians ever treated at any hospital in Pennsylvania—data that the hospitals themselves provided to the Commonwealth—AAPS felt compelled to provide the Third Circuit with its objective factual findings and expertise in an *amicus curiae* brief, reproduced in the Appendix starting at page 107a, below. AAPS values its longstanding credibility and submits *amicus* briefs very selectively. *See,* http://www.aapsonline.org/peerreview-cases.htm. It does not represent Petitioner, but rather a membership committed to the best interests of its patients. If necessary to achieve this goal, it even submits *amicus curiae* briefs opposing the doctor. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000). AAPS concluded definitively that the Respondents all victimized Petitioner, Dr. Steven H. Untracht, with a classical sham peer review.

C. Factual background and proceedings below[2]

In October 1994, a senior UPMC Lee Regional ("Lee") surgeon had retired and his associate Dr. Robert McKay resigned his clinical privileges and relocated. Lee, therefore, sought to recruit Petitioner to fill the impending void, telling him that the quality of the remaining surgeons was inadequate to prevent a continued loss of patients to Respondent Conemaugh Health System's Memorial Medical Center ("Conemaugh"). Lee was particularly concerned with the other surgeons' unwillingness to treat critically ill

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[2] Because the Respondents refused to provide any mandatory disclosures pursuant to F.R.C.P. 26(a)(1), to attend their depositions or to provide any probative discovery, the facts are taken from evidence admitted in administrative hearings at the two Respondent Johnstown, PA, hospitals and from other evidence properly entered by Petitioner into the case below according to the Federal Rules of Civil Procedure.

patients or to adopt advanced techniques of minimally invasive surgery.

The other general surgeons objected to another colleague coming to Johnstown, PA, and, as documented in Lee's own meeting minutes, they complained to the hospital's then CEO on September 4, 1994, that there would not be adequate work for them if another surgeon came to town. Those minutes state:

> A concern was expressed regarding the hospital recruiting a general surgeon to replace Dr. Robert McKay. It was noted that it was the opinion of the general surgeons currently on staff that the volume in Johnstown does not warrant another general surgeon. It was felt that prior to recruitment the surgical department should have an opportunity to express their opinion. (Lee Hearing Exhibit U-189).

Over these objections, Petitioner was appointed to Lee's and Conemaugh's medical staffs in early 1995. From the day Petitioner arrived he was subjected to major hostility from some of these competing general surgeons, who lost considerable business. By 1998 Respondent Fikri's inpatient surgical caseload had declined by 35% since Petitioner arrived in Johnstown, corresponding to a net income decline of 50%. At about that time, Respondent Fikri complained to Respondent Dinesh Mathur that Mathur was referring too much work to Petitioner and not enough to Fikri.

Additionally, for his entire tenure, Petitioner had been the only active general surgeon excluded from Lee's surgical quality review committee ("SQRC," the hospital's committee charged with carrying out peer review), despite his annual requests for a seat on that committee. Instead, the other general surgeons, especially Respondents Fikri and Murali, populated the SQRC and turned it into a "star-chamber" proceeding against Petitioner, secretly singling

out his cases and labeling them with "quality concerns"—often not specifying what were those concerns and, unfathomably, even where the patient suffered no morbidity or mortality. Concurrently, these competitors on the SQRC reviewed their own cases and passed them off with no quality concerns, even in cases with major morbidity and mortality. They excluded Petitioner from the proceedings, despite explicit provisions in Lee's medical staff bylaws, Article IV – Part E: Section 2. (a) (1996), which require:

> Any medical staff appointee whose clinical work is scheduled for discussion at a regular departmental meeting shall be so notified and shall be expected to attend such meeting. If such individual is not otherwise required to attend the meeting, the chairman of the department shall give the individual advance written notice of the time and place of the meeting at which attendance is expected. Whenever apparent or suspected deviation from standard clinical practice is involved, the notice to the individual shall so state, shall be given by certified mail, return receipt requested and the individual's attendance at the meeting at which the alleged deviation is to be discussed shall be mandatory. (Emphasis added).

Petitioner never received any notice specified by this provision, contrary to what the Lee would have done were they truly interested in "patient safety," providing fair investigation or improving the quality of healthcare.

Nonetheless, while Respondent Fikri's practice was shrinking, Petitioner flourished, aided by restraints imposed on his detractors by Dr. George Wheeling, chairman of the Lee's surgery department during Petitioner's first four years there. Dr. Wheeling gave the baseless complaints against Petitioner the full benefit of any doubt and had them evaluated in two independent extramural reviews by

a surgeon who found no deviations from the standard of care by Petitioner and praised Petitioner's clinical results. Dr. Wheeling testified:

> Q: During the course of since you were involved with Dr. Untracht's [] situation . . . for several years [] while these charts were being sent out and so forth, did at any time, in your opinion, is there anything selective about that, Dr. Untracht being singled out or targeted or whatever? You know, I don't want to use a [pejorative] term?
>
> . . .
>
> THE WITNESS: Yes, I would have to say that there was a general feeling of adversity towards Dr. Untracht, as opposed to many other members of the surgical department. And I can't give you any specific reason. The impression was that it was political and personalities entered largely into many of the complaints that arose or resulted in this review. (Lee Hearing Tr. 12/1/01, p. 118).

Dr. Wheeling further testified:

> Q Doctor, . . . were you familiar at that time with the type of cases that Dr. Untracht undertook?
>
> A Yes, we did review that. That was part of our review and we came to the conclusion that he did treat an older population and he did, in fact, participate in surgery which is complex and that <u>his results were quite good</u> and there was no basis upon which we could censure him or reduce his privileges. . . . [Y]ou would anticipate in the older population with more complex diseases . . . a greater morbidity and a greater mortality and, in fact, we did not find

> that to be the case, in Dr. Untracht's [patients]. (Lee Hearing Tr. 12/1/01, p. 109, emphasis added).

That review found that whereas Petitioner met the standard of care, one of his competing surgeons did not. As if unconcerned with furthering quality, Lee took no remedial action to correct the deficient practice of that substandard competing surgeon.

In October 1998, Petitioner submitted his second biennial reappointment application to Lee's medical staff. Dr. Wheeling, saw no reason not to reappoint him without restriction. But the next month Dr. Wheeling retired and was replaced as chief of Lee's surgery department by Respondent Fikri, Petitioner's direct competitor.

In one of his first acts as chief, Fikri reviewed Petitioner's credentials file and then secretly withdrew Petitioner's reappointment application and sequestered the file from the hospital's committees and trustees for more than seven months, violating Pennsylvania law and Lee's bylaws, Article VIII Part A § 4 (b) (1996), which states that the department chairman shall review and comment upon the applicant's qualifications and return the reappointment papers within fifteen days.[3] Instead, and despite lack of any prior notice as mandated by the bylaws Article IV - Part E: Section 2. (a) (1996), page 12 hereinabove, Fikri appeared before the Lee's credentials committee in July 1999 with SQRC chairman, Respondent Fiorica, and demanded that Petitioner not be reappointed to the medical staff because of alleged deviation from standard clinical practice. Fikri and Fiorica justified their recommendation by contending that during the 1997-1998 appointment term

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[3] In 2001, Pennsylvania's Department of Health investigated this issue, complaint # PIT01C390J, and concluded by clear and convincing evidence that Lee violated its bylaws by permitting Fikri to sequester Petitioner's reappointment application.

Petitioner had six cases in which the SQRC found quality concerns.

One of those six cases was that of an elderly man made despondent by a botched, ill-advised hemorrhoidectomy performed by Fikri himself. Because of Fikri's refusal to correct the problem, this patient sought refuge from Petitioner. Petitioner promptly cured the painful complication, without incident. To this day, the Lee has yet to reveal their "quality concern" with Petitioner's treatment of this elderly man.

According to the July 12, 1999, credentials committee minutes, based on Fikri and Fiorica's comments Lee resolved to create an objective "summary of peer comparisons including major procedures performed, infection rates, blood loss, etc." "to isolate the depth of concern" about Petitioner (Lee Hearing Exhibit U-190). This type comparison is a national gold standard for assessing quality of care and constitutes the *sine qua non* for alleging substandard practice. Lee suppressed that comparison, because Petitioner's clinical results were the very best in the surgery department. When asked for a copy of it, the hospital refused to provide it, responding, "the report was not prepared."

Lee next sent the records of the contested cases to Dr. J. Milburn Jessup, a UPMC cancer surgeon chosen by Fikri himself to "rubber stamp" Fikri's allegations. Instead, Dr. Jessup returned his report on September 1, 1999, in which he found no deviation from accepted standards of care in Petitioner's handling of those six cases. Respondents Wahl and Ergas, then Lee's medical director and credentials committee chairman, respectively, reviewed Dr. Jessup's report with Petitioner on Thursday, September 2, 1999, and told Petitioner that they saw no problem with anything in Dr. Jessup's report and would ask Fikri to sign off on Petitioner's reappointment application promptly.

Instead of signing off on Petitioner's reappointment, Fikri and Fiorica returned to the credentials committee on October 4, 1999—as the minutes of that meeting state—"to discuss the issues," and insisted that the committee disregard Dr. Jessup's report and not allow Petitioner to practice surgery. This lobbying violated Lee's bylaws, Article IV, Part B, § 8 (1996), which specify:

> In any instance where a department chairperson, or member of any medical staff committee has a conflict of interest in any matter involving another medical staff appointee that comes before such individual or committee, or in any instance where such an individual brings the complaint against that appointee, such individual shall not participate in the discussion or voting on the matter, and shall absent himself from any meeting concerning the appointee in question, although that individual may be asked, and may answer, any questions concerning the matter before leaving. (Emphasis added).

Betraying economic motives, the minutes of that October 1999 credentials committee meeting also reveal that the committee, Fikri and Fiorica resolved that Petitioner's competitors at Lee were to "proctor" Petitioner, who "would have to pay the physician who is proctoring."

Fikri continually refused to sign Petitioner's reappointment application, in an ongoing violation of Article VIII Part A § 4 (b), *supra*, unless Lee devised a stratagem to remove Petitioner from the medical staff and report him to Data Bank. Lee refused to enforce its own bylaws.

Instead, Lee and various of the other Respondents continually besmirched Petitioner's character and competence—especially at medical staff committee meetings, from which they wrongfully excluded Petitioner—with falsehoods that they expanded and repeated incessantly despite being

dispelled by each of the hospital's several outside surgeon reviewers. Fikri and Murali then compelled Lee to deny equal access of Petitioner's patients to its operating rooms and to change the hospital's bylaws specifically to prejudice Petitioner retroactively.

Next, when Petitioner failed to provide his detractors with even a single surgical complication or bad clinical result, between noon, Saturday, October 14 and 8 a.m., Tuesday, October 17, 2000, Lee then resorted to stripping the insulation from one of Petitioner's surgical instruments, a cautery electrode that the hospital reserved for his exclusive use, knowing that such sabotage would likely cause a fatal complication. Although Petitioner single-handedly averted mortality in the patient injured that fateful Tuesday by the tampered surgical equipment, 59-year-old Mr. George Fesko, Lee used this one complication—a crisis of their own creation—to initiate a sham peer review against Petitioner.[4]

In ushering in the sham discipline, glaring evidence further proves that Lee ignored the conflict-of-interest clause, Article IV, Part B, § 8 (1996). Not only does the attendance record for a July 10, 2001, meeting of Lee's executive committee (the committee that advises the hospital's board on medical staff privileging issues) not state that any of the general surgeons were asked to leave the meeting and not participate in the discussion about Petitioner, who was never permitted to appear before the committee,

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[4] A subsequent review involving the defective surgical equipment by Pennsylvania's Department of Health, Complaint # PIT01C407J, concluded by clear and convincing evidence that Lee was culpable in its procedures regarding this instrument. The tampering is obvious from surgical video recordings of the electrode's use on October 14, 2000, unknown to Lee until it already started administrative hearings against Petitioner. In 2002, Mr. Fesko and his wife sued Lee, but not Petitioner, for the injuries caused by the damaged cautery probe. Subsequent evaluation of the cautery electrode by the Fesko's engineer confirmed the defects and alteration in the instrument.

that very document (Lee Hearing Exhibit H-139, introduced by Lee for other purposes, unaware of this significance) reveals that Respondent Murali, Petitioner's direct competitor, was permitted to vote to restrict Petitioner's practice of surgery!

Ultimately, through vague, disparate and arbitrary criteria, Lee revoked Petitioner's clinical privileges and terminated his career in September 2003, with a defamatory report to the Data Bank. Lee took this draconian action despite the conclusion of its own hearing panel, which urged that Petitioner should be permitted to practice surgery at the hospital, and despite having denied Petitioner the right to call witnesses in opposition to the revocation. *See* Pet. App. p. 131a. *et seq.* Lee was all too eager to destroy a surgeon's career on false pretense, because pursuant to Petitioner's whistle blowing to Mr. Fesko's family and regulatory agencies the hospital suffered litigation and sanctions from the Joint Commission for the Accreditation of Healthcare Organizations and Pennsylvania's Department of Health.

All along, Conemaugh reviewed Lee's allegations and found them baseless[5] until mid 2002 when it began negotiating with Respondent UPMC Health System, Inc., to acquire Lee, which had collapsed financially because of executive mismanagement and its poor clinical results

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[5] In a subsequent lawsuit filed by a patient's family (that of Mr. E., *see below*) against Conemaugh for not having suspended Petitioner's clinical privileges on the basis of the ongoing allegations at Lee, Conemaugh certified that it had reviewed all of Lee's accusations against Petitioner, saw nothing in them that warranted restricting his surgical privileges and that "up to and including November 22, 2002," Petitioner "appeared to be a competent surgeon." Conemaugh prevailed in that lawsuit; hence, judicial estoppel applies to any inconsistent assertions in this matter. *Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510, 513 (3d Cir. 1953), *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,,* 81 F.3d 355 (3rd Cir. Pa.), 1996), *Government of the Virgin Islands v. Paniagua,* 922 F.2d 178 (3rd Cir. 1990); *Murray v. Silberstein,* 882 F.2d 61 (3rd Cir. 1989).

reported by Pennsylvania's governmental healthcare quality agency.[6]

Several months later, November 22, 2002, Conemaugh and some of its employees, together with Respondents Pai and Fritz (both of whom were employed by Respondent Associated Anesthesiologists of Johnstown), then caused the death of one of Petitioner's elderly patients with a lethal combination of intravenous drugs and thereafter threatened Petitioner that if he wanted to continue his career, he had "better make an 11th-hour deal with Lee," and settle all claims against UPMC and Lee on their terms.

When (and because) Petitioner failed to do so, Conemaugh then resolved to revoke his clinical privileges by accusing him of having caused the death of his 85-year-old patient. Ultimately, Conemaugh's own attorney agreed at the end of an intra-hospital hearing, on May 21, 2003, that Petitioner had proven to a high burden that he had not mistreated Mr. E., the patient who died, and had not used bad clinical judgment, but maintained that:

> Doctor Untracht acknowledged during my Cross Examination that in his meetings with the E family after this unfortunate incident involving Mr. E that he had instructed them that Mr. E's death resulted from the actions of the anesthesia department. He had assisted them in retaining the services of a malpractice attorney to represent the family against those doctors. And we would submit that that admission, which is part of the record, is a clear demonstration that Doctor Untracht has not demonstrated the collegiality and professional

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[6] In August 2005, Pennsylvania's attorney general charged that these merger negotiations violated the antitrust laws. The merger was permitted to consummate only after Conemaugh conceded control of some of its business practices to the Commonwealth.

conduct required of a doctor under the bylaws. (Conemaugh Hearing Tr. 5/21/2003).

For this very reason alone,[7] Conemaugh revoked Petitioner's clinical privileges in August 2003 and immediately thereafter submitted a false, defamatory report to the Data Bank. Conemaugh took this action notwithstanding that it constitutes illegal retaliation against whistleblowers under Pennsylvania's Medical Care Availability and Reduction of Error Act, "MCARE," 40 Pa.C.S. § 1303.307(b)(4), which requires open, honest communication between a physician, his patient and his patient's family.[8]

Consequently, in May 2003 Petitioner filed a lawsuit against the Respondents in the district court. Pursuant to Respondents' motions the pleadings were amended. In addition to various state-law claims and a request for relief under MCARE, Petitioner stated federal claims of civil rights violation under 42 U.S.C. §§ 1983 and 1981 (reverse

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[7] The district court later confirmed the factual finding that "[t]he Conemaugh hearing panel determined revocation of Plaintiff's privileges was warranted based on the unprofessional nature of Plaintiff's communications with EE's family." Pet. App. p. 38a, below.

This disparate treatment of Petitioner contrasts with Conemaugh's appeasement of Fikri. In October 2002 Fikri operated on the wrong side of a young woman's neck at Conemaugh, then falsified the medical record to conceal the misdeed and lied to the patient that he removed her symptomatic tumor. When this poor woman's symptoms continued unabated, on December 12, 2002, (just six days before Conemaugh resolved to revoke Plaintiff's clinical privileges for what it called "unprofessional conduct") Fikri's then former patient needed to undergo another major surgical operation by another surgeon at Conemaugh, this time on the correct side of her neck. Conemaugh took no disciplinary action against Fikri, even after the patient sued.

[8] In its reports to the Data Bank, Conemaugh stated, notwithstanding its own official conclusions to the contrary and without describing the acts or omissions or other reasons for the action (per § 11133(a)(3)(B), p. 6, above), that Petitioner had caused the death of Mr. E. by poor medical judgment, that after having caused the death Petitioner behaved unethically and that after due process Conemaugh revoked Petitioners clinical privileges.

national origin discrimination by Fikri, Murali, Mathur and Pai) and antitrust violations under the Sherman Act §§ 1 and 2. The case was venued in the United States District Court for the Western District of Pennsylvania according to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367 (supplemental jurisdiction).

Petitioner explicitly stated in paragraph 99 his Complaint that the Defendants' mandatory reporting to the Data Bank pursuant to the HCQIA makes them state actors under § 1983:

> These Defendants, as state actors, acted under color of Pennsylvania state law while exercising their peer review responsibility pursuant to federal law (HCQIA) and the 14th Amendment of the United States Constitution.

Each Respondent refused to appear for his or her deposition, to provide Petitioner with any meaningful discovery or even to provide any mandatory disclosures pursuant to F.R.C.P. 26(a)(1), despite lacking protective orders. Instead, after close of discovery the Defendants moved for summary judgment, which the district court granted as to each federal claim, in a 69-page opinion issued on August 30, 2006, reproduced in the Appendix beginning on p. 4a. Almost without exception, the district court copied verbatim the statements of facts as pled by the Respondents in their motions for summary judgment and then deemed those allegations as undisputed for the purpose of disposing the case.

In its opinion, the district court not once mentioned the Respondents' refusal to provide Petitioner with discovery or disclosure, despite Petitioner having preserved his rights and emphasized these violations repeatedly and by the requisite affidavit in his submissions opposing summary judgment. Although the district court acknowledged Petitioner's claim that state action applied because of the Data Bank reporting pursuant to HCQIA (Pet. App. p. 63a

[FN14]), it immediately dismissed the claim by stating only, ". . . the Court finds that Plaintiff fails to create a genuine issue of material fact that any of the § 1983 Defendants are state actors . . ." (*id.*). Likewise, the district court disposed of the § 1981 reverse national-origin discrimination claim by ruling, "Section 1981, however, does not recognize claims for national origin discrimination. 42 U.S.C. § 1981. Therefore, Plaintiff's assertion of reverse national origin discrimination under § 1981 fails to state a claim upon which relief can be granted" (Pet. App. p. 81a). In the case of the antitrust claims, despite the ongoing, illegal anticompetitive merger discussions between Conemaugh, Lee and UPMC and Conemaugh's direct threat to Petitioner that he had "better make an 11th-hour deal with Lee," the district court ruled, "[o]ther than bare allegations, Plaintiff offers no evidence of a conspiracy, an essential part of an antitrust violation" (Pet. App. p. 50a). About Conemaugh's undisputed threat, the district court stated, "[t]he allegation borders on the absurd . . ." (Pet. App. p. 62a).[9]

Petitioner timely appealed to the Third Circuit on September 22, 2006, thereafter supported by AAPS's *amicus curiae* brief. After review by the merits panel, the Third Circuit scheduled the matter for oral argument, which was heard on September 26, 2007. Five days later, on October 1, 2007, the Third Circuit affirmed the district court without comment. The opinion, attached hereto, states only, "[w]e have carefully considered the very thorough, 69 page memorandum opinion of the District Court, the appellate

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[9] Because the Respondents refused to provide Petitioner with any discovery before moving for summary judgment, Petitioner did not learn until long after he opposed the motion that the acquisition of Lee by Conemaugh violated antitrust laws. However, when it dismissed Petitioner's case the district court knew about the antitrust violations because Pennsylvania's lawsuit against UPMC, Lee and Conemaugh was filed in the same venue in August 2005. Petitioner did, nonetheless, make the Third Circuit aware of the Commonwealth's claims against the Respondents and the prejudice caused by the Respondents' refusal to provide discovery and disclosure.

the appellate briefs of the parties, and the oral argument before this Court. For the reasons stated by the District Court, we will affirm its August 26, 2006, judgment in favor of the defendants" (Pet. App. p. 3a).

In taking this extraordinary step, the panel failed to address any of Petitioner's federal issues, each of which rests firmly on well-settled precedent of the Third Circuit itself and of this Honorable Court. On October 30, 2007, the Third Circuit declined to rehear the appeal *en banc*.

REASONS FOR GRANTING THE WRIT

The record below vividly abrogates the standard of "Equal Justice Under Law." It lacks "evenhandedness, predictability, stability, [and] the appearance of integrity in the judicial process" that the adherence to rules and precedent guarantee. John G. Roberts, Jr., *Senate Confirmation Hearings,* September 12-15, 2005 (response to Sen. Specter). Among the troubling list of transgressions, we could find no other case where a district court (even the district court below) adjudicated a summary judgment motion by accepting as true and undisputed the facts as pled by the moving party, discarded the non-movant's evidence as "absurd," and then entered summary judgment for the very party that refused to attend its own deposition or even to provide any mandatory F.R.C.P. 26(a)(1) disclosures. Under F.R.C.P. 37(c)(1) the Respondents' refusal to disclose pursuant to Rule 26(a)(1) required the district court to deny their motions: "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Rule 37(c)(1). According to the Third Circuit's own precedent, abuse of discretion exists "when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used." *Evans v. Buchanan,* 555 F.2d 373, 378 (3d Cir.

1977). Yet, under such bizarre circumstances, the Third Circuit chose to say only "we affirm" and call it a day.

We also could not find another case from the Third Circuit where the court affirmed an opinion below without comment, especially a case that the circuit's own merits panel selected for oral argument, and especially following argument by less than one week. Third Circuit opinions are routinely issued more than two months after argument.

Thusly was Petitioner denied his Fourteenth Amendment right to equal protection of law and ejected from court without a single reason ever being mentioned as to why state action under § 1983 does not apply to activities mandated by the government, or why § 1981 does not protect against discrimination by national origin or why the Respondents need not have appeared at their own depositions or even provided the disclosures required of all litigants. The courts below have arbitrarily and capriciously rendered a decision in favor of the defaulting parties, both profoundly wrong and intolerably harsh in result; the Third Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. SUP. CT. R. 10(a).

Beyond these extreme departures, this case presents important, fundamental questions of federal law regarding civil rights under §§ 1981 and 1983 that either have not been, but should be, settled by this Court or have been decided in a way conflicting with this Court's relevant decisions. Most importantly, this matter presents a serious Constitutional issue that affects everyone and begs for this Court's attention. SUP. CT. R. 10(c).

A. The Third Circuit's ruling on § 1981 legitimizes persecution.

Under Pennsylvania law, a hospital's bylaws constitute a contract between each medical staff member and the

hospital (*Berberian v. Lancaster Osteopathic Hospital Association,* 395 Pa. 257, 149 A.2d 456 (1959); *Miller v. Indiana Hospital,* 277 Pa.Super. 370, 419 A.2d 1191 (1980), *Posner v. Lankenau Hosp.,* 645 F.Supp. 1102, 1106 (E.D.Pa. 1986)), and their violations at Lee and Conemaugh by foreign-born Fikri, Murali, Mathur and Pai—as painstakingly detailed herein above (p. 10 *et seq.*)—are just the sort of wrongs that § 1981 was meant to redress by mandating that *all persons* shall have equal rights to "make and enforce contracts."

According to the district court and, hence, the Third Circuit, "[a] plaintiff also carries the initial burden to establish a *prima facie* case for reverse *racial* discrimination in that he must show that the employer is treating similarly situated people less favorably than others because of their race; however, a claim for *national origin* discrimination is not a viable claim under § 1981." Pet. App. p. 79a, (emphasis original).

Ignoring the statute's plain wording and the Third Circuit's own precedent in *Iadimarco v. Runyon,* 190 F.3d 151, 161 (3d Cir, 1999) ("the plaintiff must be able to produce sufficient evidence . . . that the defendant treated plaintiff less favorably than others because of his race, color, religion, sex, or national-origin"), the ruling below presumes that 42 U.S.C. § 1981 really means to say "[a]ll persons within the jurisdiction of the United States, *other than those who differ only by religion, sex, or national origin,* shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence . . . as is enjoyed by white citizens . . ." *Ergo,* acting on ethnic hatred or misogyny are permissible under § 1981, provided the abuser and victim share the same pigmentation.

Such are the unsustainable consequences of the district court and Third Circuit's ruling, by their abusing the tiers of scrutiny and imposing such divisive limitations on

our civil rights laws (*see, e.g., Craig v. Boren,* 429 U.S. 190, 211 (1976) (concurring opinion)), thereby providing those so inclined with the most subtle, most efficacious means to unravel the fabric of American society. As explained by the Chief Justice, "there are areas in which you think it is almost never the case that distinctions that are drawn can be legitimate, distinctions based on race or ethnicity . . . . it is perfectly appropriate to apply the Equal Protection Clause to issues of gender and other types of discrimination beyond the racial discrimination that was obviously the driving force behind it." John G. Roberts, Jr., *Senate Confirmation Hearings,* September 12-15, 2005 (responses to Sens. Durbin and Grassley, respectively) (emphasis added).

B. The Third Circuit's ruling on § 1983 violates longstanding precedent of the Supreme Court.

This Court settled the question of state action in 1944, by holding that when private parties undertake statute-mandatory actions that damage other individuals, those private parties are state actors. "The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a [private] party." *Smith v. Allwright,* 321 U.S. 649, 663, 64 S.Ct. 757, 765 (1944); *see also, Terry v. Adams,* 345 U.S. 461, 463 (1953) (public function test). This Court has not since disturbed this important holding. *See, e.g., California Democratic Party v. Jones,* 530 U.S. 567, 573 (2000) ("when a State prescribes a[ ] process that gives a special role to [private] parties, the parties' discriminatory action becomes state action").

Smith concerned a private political party in its conduct of primary elections under mandate by state law. Smith was deprived by the private Texas Democratic Party of the ability to vote in the Party's primary election, conducted pursuant to Texas law. This Court held that the Democratic Party, although a private entity, was a state actor.

Even more immediate than the right to vote, Petitioner was deprived of his good name, livelihood and cherished medical career by the actions of private hospitals and doctors conducted pursuant to the special role conferred by HCQIA. In quoting Shakespeare's *Othello*, Chief Justice Rehnquist spoke for this Court about the centuries-old injunction against character assassination: "he that filches from me my good name—Robs me of that which not enriches him,—And makes me poor indeed." *Milkovich v. Lorain Journal,* 497 U.S. 1 (1990). In the words of his successor, the dismissal for lack of state action of Petitioner's § 1983 claim constitutes "[a]n overruling of a prior precedent[, which] is a jolt to the legal system." John G. Roberts, Jr., *Senate Confirmation Hearings,* September 12-15, 2005 (response to Sen. Specter).

If private hospitals became state actors for reporting a physician to the Data Bank and for other activities mandated by HCQIA, a physician aggrieved by wrongful reporting would, as Congress ostensibly intended, have automatic standing to bring a federal lawsuit under § 1983. Such a lawsuit would not be subject to the qualified immunity of HCQIA § 11111(a) (1)(D). Thus, Petitioner could sue Conemaugh under § 1983 for violating his First Amendment right to free speech. Furthermore, because rogue hospitals necessarily premise sham peer review on vague, disparate criteria of healthcare quality—as did Lee against Petitioner—a physician so shammed could base his civil-rights claim on the void-for-vagueness doctrine.

The void-for-vagueness doctrine under the Fourteenth Amendment Due Process Clause arose in the context of challenges to the clarity of criminal statutes. *See, Kolender v. Lawson,* 461 U.S. 352, 357 (1983*); Coover v. Saucon Valley School Dist.,* 955 F. Supp. 392, 401 (3d Cir. 1997). By failing to articulate the proscribed conduct fully, unconstitutionally vague laws offend notions of fair warning, a fundamental aspect of due process protection. *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999); *Grayned v. City of*

Rockford, 408 U.S. 104, 108-09 (1972); *San Filippo v. Bongiovanni,* 961 F.2d 1125, 1135 (3d Cir. 1992). This Court explained that:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108-09. Because the same fairness concerns arise in the course of civil litigation, the void-for-vagueness doctrine also applies to civil cases. *See generally A.B. Small Co. v. American Sugar Refining Co.,* 267 U.S. 233 (1925); *San Filippo,* 961 F.2d 1125. Thus, under the void-for-vagueness doctrine, which Petitioner properly pled, a state-actor hospital may not remove a good-quality physician from its medical staff on the basis of cloudy, nonspecific *post-hoc* criteria, but must follow well-defined, well-recognized, objective standards of medical quality.

For these reasons, by affirming that Data Bank reporting is state action this Court would not only respect precedent; it would coincidentally promulgate the perfect remedy for sham peer review. State action provides equal, potent protection for doctors (against sham peer review) and for hospitals (against frivolous lawsuits in response to good-faith peer review). Hospitals could not remove good doctors from their staffs. But also, hospitals could not

remove only some poor doctors while permitting other, favorite substandard physicians to continue practicing. They would need to apply proper standards equally to all medical staff members. In this way, such a ruling would conform to this Court's entrenched precedent and permit HCQIA to accomplish precisely what Congress intended, to the public's ultimate benefit.

C. The decision below leaves no remedy for physicians or patients injured by sham peer review.

The plain wording of the HCQIA (p. 3, above) makes abundantly clear that Congress did not intend to empower private hospitals to practice sham peer review, but rather expected them to use the same standards and criteria in evaluating its doctors as those used by the states themselves; otherwise the law would achieve a result counter to its purpose, as was the situation with Petitioner. Yet, without the ability of a wrongfully blacklisted doctor to sue a hospital under § 1983, HCQIA's immunity provisions (§ 11111[a][1]) leave no legal remedy not only for the doctor, but also for patients harmed by the effects of the sham. "Congress would [not], without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

After an exhaustive review of the record and a rigorous statistical evaluation of clinical outcome data, AAPS found that Petitioner cared for the most critically ill patients with the most difficult clinical problems, patients that Fikri, Murali and the other Lee surgeons refused to treat (Pet. App. p. 117a). Yet, even then, Petitioner achieved clinical results significantly better than those of his detractors, who ruined Petitioner simply because they were incapable of competing with him. As a result, with false Data Bank reports they deprived the United States, not just Johnstown, PA, of a superior doctor, committing Petitioner's unwitting potential future patients to significantly higher likelihood of morbidity and mortality under

treatment by other surgeons.[10] Unless this Court grants a writ of certiorari in this matter, these patients and their loved ones will continue to have no protection or recourse against those who deprived them, via sham peer review, of a physician who likely would have avoided their morbidity or untimely death. This defeats what Congress intended. Although such foul play might be standard practice in the countries in which Fikri, Murali, Mathur and Pai were born and educated, America can and should enforce higher standards.

If this case were only about the "administrative murder" of a single doctor, the stakes would not be so high. Caught in the middle of this conflict are the innocent public, people like Mr. George Fesko, Mr. E. and the young woman whose throat Fikri cut for naught (n. 7, p. 20), each of whom suffered because of the toxic atmosphere fomented by sham peer review. Everyday people like these throughout the entire country—not just doctors like Petitioner—depend on the integrity of the system to protect them when in need of modern medicine or simple justice. By granting a writ of certiorari and defining yet again the boundaries of our civil rights, this Court has a unique and rare opportunity to stop medical peer review from becoming primarily a struggle for money and power, leveraged against patients who serve as nothing more than commodities and bargaining chips.

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[10] Pennsylvania's medical licensing board undertook its own investigation into the revocation of Petitioner's clinical privileges at Lee and Conemaugh. Based on the facts, including Petitioner's superior clinical outcomes, Pennsylvania took no action against Petitioner's medical license, which remains in good standing. The licensing board, however, has no authority to order the reinstatement of Petitioner's clinical hospital privileges; only the courts can do so.

D. The Constitution guarantees every person the protection of his or her civil rights, which the courts below have deprived of Petitioner.

If this Court were disinclined to order full merits briefing out of concern for its limited resources, it should nonetheless consider summary reversal, perhaps with a well-deserved judgment of default against the Respondents, so as to protect paramount Constitutional guarantees and to fix a travesty in the administration of justice.

Supreme Court Rule 16.1 provides that this Court may resolve a petition for certiorari by issuing a "summary disposition on the merits." SUP. CT. R. 16.1. Summary dispositions, invariably reversals, occur quite regularly. During the 2006 Term there have been more than eight summary reversals (not counting a confession of error by the government).[11] Four of those eight summary reversals involved unpublished opinions in the courts of appeals. During this Court's 2004 Term there were four summary

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[11] *Gonzales v. Thomas*, 547 U.S. 183, 126 S. Ct. 1613 (2006) *(per curiam)* (grant of cert. and summary reversal of *en banc* Ninth Circuit due to obvious error); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 126 S. Ct. 1195 (2006) *(per curiam)* (granting cert. and vacating unpublished Eleventh Circuit decision due to error in standard applied); *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 126 S. Ct. 1193 (2006) *(per curiam)* (granting cert. and summarily vacating decision of Ninth Circuit for error in failing to consider a critical legal issue underlying its decision); *Bradshaw v. Richey*, 546 U.S. 74, 126 S. Ct. 602 (2005) *(per curiam)* (granting cert. and vacating decision of Sixth Circuit due to error); *Kane v. Garcia-Espitia*, 546 U.S. 9, 126 S. Ct. 407 (2005) *(per curiam)* (granting cert. and reversing unpublished Ninth Circuit decision based on error); *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403 (2005) *(per curiam)* (granting cert. and reversing Seventh Circuit decision based on error); *Schriro v. Smith*, 546 U.S. 6, 126 S. Ct. 7 (2005) *(per curiam)* (granting cert. and vacating unpublished order of Ninth Circuit based on error in ordering state court trial); *Dye v. Hofbauer*, 546 U.S. 1, 126 S. Ct. 5 (2005) *(per curiam)* (granting cert. and reversing unpublished Sixth Circuit decision based on error).

reversals.[12] And during the 2003 Term there were five summary reversals, two of which were of unpublished court of appeals decisions.[13] Over these three Terms, therefore, summary reversals account for between 5% and 14% of this Court's published dispositions on the merits. This Court thus is quite willing to use summary reversal as a more efficient alternative to full review in appropriate cases. In this matter, where the answer to each of the first two questions presented for review herein is clearly and undeniably "Yes" and free of doubt, any lesser action would be tantamount to a decision on the merits and turn Petitioner into a second-class citizen.

In light of the extreme departures of the courts below, however, Equal Justice begs for more than the Band-Aid of a mere remand. This Petition does not concern erroneous factual findings or the misapplication of a properly stated

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[12] *Bell v. Cone*, 543 U.S. 447, 459-60 (2005) *(per curiam)* (granting cert. and reversing Sixth Circuit based on error in giving insufficient deference to prior state court decision); *Brosseau v. Haugen*, 543 U.S. 194, 198 n. 3 (2004) *(per curiam)* (granting cert. and reversing Ninth Circuit decision "to correct a clear misapprehension of the qualified immunity standard"); *City of San Diego v. Roe*, 547 U.S. 77 (2004) *(per curiam)* (granting cert. and reversing Ninth Circuit decision based on fact-bound error); *Smith v. Texas*, 543 U.S. 37 (2004) *(per curiam)* (granting cert. and reversing Texas Court of Criminal Appeals based on error concerning jury instruction).

[13] *Holland v. Jackson*, 542 U.S. 649 (2004) *(per curiam)* (granting cert. and reversing unpublished Sixth Circuit decision based on error regarding fact-specific application of law); *Middleton v. McNeil*, 541 U.S. 433 (2004) *(per curiam)* (granting cert. and reversing Ninth Circuit decision based on error in evaluating particular jury instructions); *Illinois v. Fisher*, 540 U.S. 1174 (2004) *(per curiam)* (granting cert. and reversing seemingly unpublished Appellate Court of Illinois decision based on simple misapplication of law); *Mitchell v. Esparza*, 540 U.S. 12, 15 (2003) *(per curiam)* (granting cert. and reversing Sixth Circuit decision based on court having "failed to cite, much less apply," controlling statutory provision); *Yarborough v. Gentry*, 540 U.S. 1 (2003) *(per curiam)* (granting cert. and reversing Ninth Circuit decision based on fact-specific analysis of the objective adequacy of a closing argument by defense counsel).

rule of law. Rather, the actions of the Respondents and then those of the courts below have deprived the Petitioner of his irrevocable civil rights as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution. The judicial result of constricting the boundaries of Petitioner's civil rights (as detailed above at p. 23 *et seq.*) has sanctioned conduct utterly intolerable in a civil society (*e.g.*, pp. 17, 19, above), inflicted by powerful, politically connected Respondents (UPMC, Lee and Conemaugh) allied to four naturalized aliens (Fikri, Murali, Mathur and Pai) who swore an oath not to instigate any of these wrongs in return for the privilege of becoming Americans!

In effecting such a perverse, apocalyptic outcome, the Third Circuit cocooned its actions within the confines of a non-precedential opinion. That the Third Circuit failed to publish its decision is just another reason to view that decision with great skepticism. The use of unpublished decisions lacking precedential force is inconsistent with the judicial function. *See Anastasof v. United States, 223* F.3d 898, 899 (CA8) (R. Arnold, J.) ("We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the judicial."), *vacated as moot,* 235 F.3d 1054 (CA8 2000) *(en banc).* As stated most succinctly by the Chief Justice, "judges operate as judges when they are confined by the law." John G. Roberts, Jr., *Senate Confirmation Hearings,* September 12-15, 2005 (response to Sen. Grassley).

Unpublished opinions seem too often to function as an excuse or tactic for less than rigorous analysis of the issues—in Petitioner's case, no analysis at all. In praising a more open and candid approach by the Seventh Circuit, this Court has implicitly criticized decisions, much like this one, that "bur[y] the issue by proceeding in a summary fashion." *Eberhart v. United States,* 546 U.S. 12, 126 S. Ct. 403, 407 (2005) *(per curiam)* (praising court of appeals for ruling

squarely on an issue in a manner that "facilitated our review," and not "bur[ying] the issue by proceeding in a summary fashion").

A panel's use of an unpublished opinion allows it to ignore inconvenient precedent within the circuit or elsewhere, tends to insulate a decision from review by this Court by failing to generate a true "split," and can be a means of using purportedly fact-dependant rulings to undermine legal principles and even inviolable rights that a court may wish to vitiate but cannot reject explicitly. *Cf.* Richard S. Arnold, *Unpublished Opinions: A Comment,* 1 J. App. Prac. & Process 219, 223 (1999) (use of unpublished opinions creates the "temptation" to ignore inconvenient precedent and "encourages" sweeping difficulties of a desired disposition "under the rug"). By definition, a non-precedential opinion creates law that applies only to the parties in the dispute under consideration and, therefore, violates the Fourteenth Amendment.

Justice Stevens has recognized, "occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." Cole, J. and Bucklo, E.E., *A Life Well Lived: An Interview with Justice John Paul Stevens,* 32 No. 3 Litigation 8, 67 (Spring 2006). In this instance the decision is much more than a little hard to justify; it is utterly outrageous. By acting summarily and non-precedentially in this matter, the Third Circuit has carved out an exception to the Constitution for the Litigants alone, uniquely stripping Petitioner of inalienable rights and turning him into a disenfranchised, defrocked pariah in the country of his birth, permitting Murali, Mathur and Pai to import the caste system under which they were born and use it at will to declare Petitioner an "untouchable." As stated by the Court itself and conveyed in the words carved into the architrave of its building's entrance, "Equal Justice Under Law" (*see,* http://www. supremecourtus.gov/about/constitutional.pdf), this Court bears

the ultimate responsibility to defend the Constitution against such mockery and rape.

During his ascent to this Court from the Third Circuit, Justice Alito told the world:

> And there is nothing that is more important for our republic than the rule of law. No person in this country, no matter how high or powerful, is above the law, and no person in this country is beneath the law.

Samuel A. Alito, Jr., *Senate Confirmation Hearings*, January 9, 2006. "[W]ithout the rule of law," explained Chief Justice Roberts, "any rights are meaningless." John G. Roberts, Jr., *Senate Confirmation Hearings*, September 12-15, 2005 (opening statement). Hence, the Court of last resort cannot deny this Petition without betraying the foremost reason for its very existence. As cautioned 250 years ago by Edmund Burke—a long-serving member of the British Parliament who supported the American colonies in the dispute that ultimately gave birth this Court—"[a]ll that is necessary for the triumph of evil is that good men do nothing."

CONCLUSION

The Supreme Court should grant a writ of certiorari in this matter, or, in the alternative, a summary reversal.

Respectfully submitted,

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Johnstown, PA 15904
(814) 535-7875
Petitioner pro se

January 11, 2008

APPENDIX

UNTRACHT V. FIKRI, 2007 WL 2868028

United States Court of Appeals, Third Circuit.

Steven H. UNTRACHT, M.D., PH.D., F.A.C.S.

v.

M.D. Erden FIKRI;M.D. Dinesh Mathur; M.D. Vincent Fiorica; M.D. Terry Wahl; David R. Davis; M.D. Sanders Ergas; M.D. P. James Ridella; M.D. Bhaskaran Murali; Will H. Farthing, M.D.; Brian Gunnlaugson, M.D.; Richard Cartwright, M.D.; Denise Weisbrodt, R.N.; Richard Saluzzo, M.D.; Jacob Kolff, M.D.; Bruce Duke, M.D.; Narendra Pai, M.D.; William Fritz, M.D.; Paul Weygandt, M.D.; Nicholas Jacobs; James Church, M.D.; Robert D. Fry, M.D.; Larry Kaiser, M.D.; William M. Carney, M.D.; Harvey Slater, M.D.; George H. Benz, Jr., M .D.; University of Pennsylvania; Cleveland Clinic Foundation; Stewart M. Flam; R. Joseph Federowicz; Dickie Mccamey & Chilcote, a Professional Corporation; Associated Anesthesiologists of Johnstown; UPMC Health System, Inc.; UPMC Lee Regional Hospital; Conemaugh Health System; Memorial Medical Center; Windber Medical Center; John Does 1-20; Lee Regional Health System, Inc.; Lee Regional Health System Foundation, Inc.

Steven H. Untracht, Appellant.

No. 06-4221.

Argued Sept. 26, 2007.

Opinion Filed Oct. 1, 2007.

On Appeal from the United States District Court for the Western District of Pennsylvania, (D.C. No. 03-cv-00199J), District Judge: Hon. Kim R. Gibson.

Russell J. Heiple, Esq. (Argued), Johnstown, PA, for Appellant.

Alyson J. Kirleis, Esq. (Argued), Dickie, McCamey & Chilcote, Pittsburgh, PA, for Appellees Lee Regional Health System, Inc.; Lee Regional Health System Foundation, Inc.; UPMC Lee Regional Hospital; UPMC Health System, Inc.; Dickie, McCamey & Chilcote; R. Joseph Federowicz; Stewart M. Flam; George H. Benz, Jr.; Harvey Slater; William M. Carney; Denise Weisbrodt; Richard Cartwright; Brian Gunnlaugson; Will H. Farthing; Bhaskaran Murali; P. James Ridella; Sanders Ergas; David R. Davis; Terry Wahl; Vincent Fiorica; Dinesh Mathur; Erden Fikri.

William J. Rogers, Esq. (Argued), Thomson, Rhodes & Cowie Pittsburgh, PA, for Appellees Memorial Medical Center; Conemaugh Health System; William M. Carney; Robert D. Fry; William Fritz; Narendra Pai; Bruce Duke; Jacob Kolff; Richard Saluzzo.

Andrew L. Schlafly, Esq., New York, NY, for Amicus-Appellant Association of American Physicians & Surgeons, Inc.

Before AMBRO, JORDAN and ROTH, Circuit Judges.

OPINION

ROTH, Circuit Judge:

*1 Dr. Steven H. Untracht brought an action in U.S. District Court against 29 physicians, health care professionals, medical groups, health systems, and medical facilities, claiming violation of his civil rights under 42 U.S.C. §§ 1981 and 1983, federal antitrust violations, defamation, and other state law causes of action, including intentional infliction of emotional distress, tortious interference with existing and prospective contractual relations, civil conspiracy, breach of contract, and more. After numerous proceedings, including a transfer of venue from the Eastern District to the Western District of Pennsylvania, the District Court entered summary judgment for all defendants on Dr. Untracht's Sherman Act Section 1 claim, Sherman Act Section 2 claim, 42 U.S.C. § 1983 claim, and 42 U.S.C. § 1981 claim for retaliation. The court dismissed with prejudice Dr. Untracht's 42 U.S.C. § § 11112 claim and his 1981 reverse discrimination claim and dismissed his remaining claims over which the court had supplemental jurisdiction. The District Court denied Dr. Untracht's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's assumption of Supplemental Jurisdiction. Dr. Untracht appealed.

The District Court had jurisdiction of this case under 28 U.S.C. §§ 1331 and 1367. We have jurisdiction of this appeal under 28 U.S.C. § 1981. We have carefully considered the very thorough, 69 page memorandum opinion of the District Court, the appellate briefs of the parties, and the oral argument before this Court. For the reasons stated by the District Court, we will affirm its August 26, 2006, judgment in favor of the defendants.

C.A.3 (Pa.),2007.

Untracht v. Fikri

Slip Copy, 2007 WL 2868028 (3rd Cir.(Pa.))

UNTRACHT V. FIKRI, 454 F.SUPP.2D 289, W.D.PA., 2006. AUG 30, 2006

United States District Court,

W.D. Pennsylvania.

Steven H. UNTRACHT, MD, PhD, FACS Plaintiff,

v.

Erden FIKRI, MD, et al. Defendants.

No. Civ.A. 03-199J.

Aug. 30, 2006.

Background: Surgeon, whose staff privileges at two hospitals were terminated, brought action against thirty-six defendants, including individual physicians and health care professionals, a university, a law firm, two lawyers, an anesthesiology group, two health systems, four medical facilities and 20 John Doe defendants, alleging Sherman Act violations, Section 1983 civil rights violations, tortious interference with prospective economic advantage, negligence, perjury and defamation. Defendants filed motions to dismiss, or, in the alternative, for summary judgment. Surgeon filed cross motion for summary judgment, injunctive relief and for the court's assumption of supplemental jurisdiction.

Holdings: The District Court, Gibson, J., held that:

(1) hospital was not judicially estopped by a statement it made in its answer in malpractice case filed against surgeon and hospital and position taken in related arbitration proceedings;

(2) arbitration result in malpractice case was not entitled to collateral estoppel effect;

(3) surgeon did not have antitrust standing to bring Sherman Act claim against hospitals;

(4) surgeon failed to establish Sherman Act claim against either hospital or their doctors;

(5) surgeon failed to establish Sherman Act conspiracy to monopolize claim;

(6) hospitals and doctors who recommended and/or participated in peer review actions against surgeon were not state actors for § 1983 purposes; and

(7) surgeon's alleged whistleblower activities were not protected under § 1981.

Defendants' motions granted.

West Headnotes

[1] KeyCite this headnote

157 Evidence

157I Judicial Notice

157k10 Geographical Facts

157k10(6) k. Distances Between Places. Most Cited Cases

A court can take judicial notice of distances.

[2] KeyCite this headnote

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2533 Motion

170Ak2533.1 k. In General. Most Cited Cases

A motion to dismiss may be converted to a motion for summary judgment if the materials submitted warrant a conversion and the parties had adequate notice.

[3] KeyCite this headnote

228 Judgment

228XVII Foreign Judgments

228k828 Effect of Judgments of State Courts in United States Courts

228k828.9 Nature of Judgment

228k828.9(4) k. Decision on Pleadings. Most Cited Cases

228 Judgment KeyCite this headnote

228XVII Foreign Judgments

228k828 Effect of Judgments of State Courts in United States Courts

228k828.22 k. Pleading, Evidence and Enforcement. Most Cited Cases

Surgeon's claims before district court, which were raised in one of his previously filed state court cases which were dismissed on the basis of preliminary objections, were not barred by collateral estoppel or claim preclusion since orders dismissing state court cases did not specify on which preliminary objection the cases were dismissed and there was no argument that the preliminary objections constituted an adjudication on the merits.

[4] KeyCite this headnote

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Doctrine of judicial estoppel prevents a litigant from asserting a position that is inconsistent with one previously taken before a court or agency.

[5] KeyCite this headnote

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Application of judicial estoppel doctrine involves a three-part test: 1) whether the party's present position is irrevocably inconsistent with the position it asserted in the prior proceeding; 2) whether the party changed its position in bad faith; and 3) whether the use of judicial estoppel is tailored to address the affront to the court's authority or integrity.

[6] KeyCite this headnote

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

In surgeon's suit against hospital arising from termination of his clinical privileges, hospital was not judicially estopped by a statement it made in its answer in the malpractice case filed against surgeon and hospital and position taken in related arbitration proceedings, that it was not negligent in credentialing surgeon through No-

vember, 2002; there was nothing inconsistent between hospital's defense that it was not negligent in credentialing surgeon between 1995 and November, 2002, and surgeon's removal from hospital's medical staff subsequent to November, 2002, and there was no evidence that hospital's assertions were accepted or adopted by any court in the course of the litigation so as to evidence bad faith on the part of hospital for deviating from those assertions.

[7] KeyCite this headnote

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Judicial estoppel is an extraordinary remedy that should be used only when a party's inconsistent behavior would result in a miscarriage of justice.

[8] KeyCite this headnote

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk381 Conclusiveness of Adjudication

25Tk382 k. In General. Most Cited Cases

Arbitration result in malpractice case was not entitled to collateral estoppel effect in surgeon's suit against hospital arising from termination of his clinical privileges; although the issue of surgeon's negligence was likely at the

forefront of the matters litigated in the arbitration proceeding, arbitrator did not offer any explanation as to why he reached the decision he did, but simply entered an award in favor of the malpractice case defendants, which resulted in the malpractice case plaintiff receiving the "low" end of the high-low arbitration.

[9] KeyCite this headnote

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties

29Tk963 Injury to Business or Property

29Tk963(1) k. In General. Most Cited Cases

To prove antitrust standing a plaintiff must show that: 1) he has suffered the type of injury the antitrust laws were intended to prevent; and 2) the injury flows from that which makes the defendant's acts unlawful.

[10] KeyCite this headnote

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties

29Tk963 Injury to Business or Property

29Tk963(1) k. In General. Most Cited Cases

Factors to be employed in an antitrust standing analysis include: 1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause the harm, with neither factor alone conferring standing; 2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; 3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; 4) the existence of more direct victims of the alleged antitrust violations; and 5) the potential for duplicative recovery or complex apportionment of damages.

[11] KeyCite this headnote

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties

29Tk963 Injury to Business or Property

29Tk963(1) k. In General. Most Cited Cases

Recovery by a private plaintiff on an antitrust claim can only be had where the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

[12] KeyCite this headnote

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties

29Tk963 Injury to Business or Property

29Tk963(3) k. Particular Cases. Most Cited Cases

Surgeon, whose staff privileges at two hospitals were terminated, did not have antitrust standing to bring Sherman Act claim against hospitals; there was no showing that hospitals acted in concert, and surgeon was not shut out from competing in the market by hospitals' actions, rather, surgeon had an active avenue of competition, his staff privileges at a third hospital, that he chose to voluntarily foreclose. Sherman Act, § 1, 15 U.S.C.A. § 1.

[13] KeyCite this headnote

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties

29Tk963 Injury to Business or Property

29Tk963(1) k. In General. Most Cited Cases

Voluntary foreclosure of one's own opportunities for competition is not the type of antitrust injury for which the antitrust laws were designed to provide redress.

[14] KeyCite this headnote

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(B) Cartels, Combinations, Contracts, and Conspiracies in General

29Tk537 k. In General. Most Cited Cases

To establish a Sherman Act violation for contract, combination, or conspiracy in restraint of trade, a plaintiff must prove: 1) concerted action by the defendants; 2) that produced anti-competitive effects within the relevant product and geographic markets; 3) that the concerted actions were illegal; and 4) that he was injured as a proximate result of the concerted action. Sherman Act, § 1, 15 U.S.C.A. § 1.

[15] KeyCite this headnote

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(B) Cartels, Combinations, Contracts, and Conspiracies in General

29Tk542 Participants

29Tk543 k. In General. Most Cited Cases

Unilateral action does not support liability under Sherman Act for contract, combination, or conspiracy in restraint of trade no matter what the motivation; there must be evidence that tends to exclude the possibility of independent action, meaning that the evidence reasonably tends to prove that the alleged conspirators had a conscious commitment to a common scheme designed to achieve an unlawful objective. Sherman Act, § 1, 15 U.S.C.A. § 1.

[16] KeyCite this headnote

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(E) Particular Industries or Businesses

29Tk593 k. Medical Services. Most Cited Cases

Surgeon, whose staff privileges at two hospitals were terminated, failed to establish Sherman Act claim against either hospital or their doctors; surgeon did not demonstrate that, as a result of the peer review actions at both hospitals, either the doctors on staff at one hospital or the doctors on staff at the other coerced their respective hospitals into revoking surgeon's privileges or that hospitals engaged in concerted activity coercing one another to revoke surgeon's privileges. Sherman Act, § 1, 15 U.S.C.A. § 1.

[17] KeyCite this headnote

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(C) Market Power; Market Share

29Tk555 Relevant Market

29Tk557 k. Product Market. Most Cited Cases

29T Antitrust and Trade Regulation KeyCite this headnote

29TVI Antitrust Regulation in General

29TVI(C) Market Power; Market Share

29Tk555 Relevant Market

29Tk558 k. Geographic Market. Most Cited Cases

In Sherman Act case, anticompetitive effects within the relevant geographic and product market may be proven by proving the existence of actual anticompetitive effects or by the defendant's market power. Sherman Act, § 1, 15 U.S.C.A. § 1.

[18] KeyCite this headnote

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(E) Particular Industries or Businesses

29Tk593 k. Medical Services. Most Cited Cases

Surgeon, whose staff privileges at two hospitals were terminated, failed to establish that the alleged concerted action resulted in anticompetitive effects in the relevant geographic and product market, and therefore failed to establish Sherman Act claim against either hospital or their doctors; surgeon's voluntary choice to resign his privileges at a nonparty hospital in the geographic market ultimately created the anticompetitive effects, if any, on the market. Sherman Act, § 1, 15 U.S.C.A. § 1.

[19] KeyCite this headnote

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties

29Tk963 Injury to Business or Property

29Tk963(2) k. Causation. Most Cited Cases

In antitrust cases, a plaintiff must prove injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. Sherman Act, § 1, 15 U.S.C.A. § 1.

[20] KeyCite this headnote

29T Antitrust and Trade Regulation

29TVII Monopolization

29TVII(B) Cartels, Combinations, Contracts, and Conspiracies

29Tk625 k. In General. Most Cited Cases

In a conspiracy to monopolize claim under the Sherman Act, plaintiff must prove: 1) an agreement or understanding between two or more parties; 2) a specific intent to monopolize; and 3) overt acts in furtherance of the alleged conspiracy. Sherman Act, § 2, 15 U.S.C.A. § 2.

[21] KeyCite this headnote

29T Antitrust and Trade Regulation

29TVII Monopolization

29TVII(E) Particular Industries or Businesses

29Tk688 k. Medical Services. Most Cited Cases

Surgeon, whose staff privileges at two hospitals were terminated, failed to establish Sherman Act conspiracy to monopolize claim against hospitals and its doctors since he failed to show that the doctors and hospitals conspired to end his surgical career. Sherman Act, § 2, 15 U.S.C.A. § 2.

[22] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1325 k. State or Territorial Action, or Individual or Private Action, in General. Most Cited Cases

To satisfy the state action requirement under § 1983, a plaintiff must prove that the alleged violations are fairly attributable to the state and courts require careful adherence to the state action requirement because it preserves an area of individual freedom by limiting the reach of

federal law and federal judicial powers. 42 U.S.C.A. § 1983.

[23] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1324 k. In General. Most Cited Cases

A plaintiff bringing a civil rights claim for damages under § 1983 must demonstrate that the defendant was a person acting under color of state law; if the record does not reflect that the defendant acted under color of state law when engaged in the alleged misconduct, a claim for violation of civil rights under § 1983 must fail as a matter of jurisdiction and there is no need for the court then to determine whether a federal right has been violated. 42 U.S.C.A. § 1983.

[24] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1325 k. State or Territorial Action, or Individual or Private Action, in General. Most Cited Cases

In § 1983 actions, state action is shown if: 1) the deprivation of federal rights was caused by the exercise of some right or privilege created by the state or by a person for whom the state is responsible; and 2) the party charged with the deprivation was a person who may fairly be said to be a state actor. 42 U.S.C.A. § 1983.

[25] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1325 k. State or Territorial Action, or Individual or Private Action, in General. Most Cited Cases

Regardless of the approach used in § 1983 actions, the heart of the state action inquiry is to discern if the defendant exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. 42 U.S.C.A. § 1983.

[26] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(3) Private Persons or Corporations, in General

78k1326(5) k. Cooperation with State Actor. Most Cited Cases

92 Constitutional Law KeyCite this headnote

92VII Constitutional Rights in General

92VII(B) Particular Constitutional Rights

92k1073 k. Fourteenth Amendment in General. Most Cited Cases

(Formerly 92k82(5))

Under symbiotic relationship test for determining existence of state action in § 1983 case, a symbiotic relationship exists where a state has so far insinuated itself into a position of interdependence with the actor that it must be

recognized to be a joint participant in the challenged activity which, on that account, cannot be considered so purely private as to fall outside the scope of the Fourteenth Amendment; the interdependence between the state and the private actor must be pronounced before the law will transform the private action into state action. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

[27] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(3) Private Persons or Corporations, in General

78k1326(4) k. In General. Most Cited Cases

Close nexus test for determining existence of state action in § 1983 case requires that a plaintiff demonstrate that there is a sufficiently close nexus between the government and the private party; primary issue to be examined under the nexus test is not whether the state was involved in some manner in the relevant events, but whether there is a sufficiently close nexus between the state and the challenged action of the private party so that the action of the private party may be fairly attributable to the state. 42 U.S.C.A. § 1983.

[28] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(6) k. Schools; Education. Most Cited Cases

Private hospitals, which were distinct and separate entities from state university, were not state actors for § 1983 purposes under the symbiotic relationship or close nexus test. 42 U.S.C.A. § 1983.

[29] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(9) k. Pursuit of Private or Judicial Remedies. Most Cited Cases

Private hospitals' action of lawfully seeking the revocation of a preliminary injunction put in place by state court at the surgeon's request in order to comply with their statutory duty of reporting to National Practitioners Data Bank (Data Bank) in no way made the hospitals state actors subject to liability under § 1983 for terminating surgeon's staff privileges. 42 U.S.C.A. § 1983.

[30] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(6) k. Schools; Education. Most Cited Cases

Private hospital's contractual relationship with university which had been held to be a state actor did not make hospital a state actor for purposes of surgeon's § 1983 claim arising from termination of his staff privileges;

affiliation agreement between university and hospital did not create a relationship of such a level that it would transform hospital's internal staffing decisions into actions that could in any way, let alone fairly, be attributable to university. 42 U.S.C.A. § 1983.

[31] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(6) k. Schools; Education. Most Cited Cases

Individual doctors at private hospital, who recommended and/or participated in peer review actions against surgeon which resulted in revocation of his staff privileges, could not be considered state actors for purposes of surgeon's § 1983 claim by virtue of fact that doctors held faculty positions at universities which had been deemed to be state actors. 42 U.S.C.A. § 1983.

[32] KeyCite this headnote

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(6) k. Schools; Education. Most Cited Cases

Regardless of whether individual doctors at private hospital, who recommended and/or participated in peer review actions against surgeon which resulted in revocation of his staff privileges at universities which had been deemed to be state actors, they could not be held liable on surgeon's § 1983 claim since there was no evidence showing

that any of them utilized power possessed by virtue of state law or their positions as clinical professors at either university when they recommended and/or participated in peer review actions against surgeon as members of the medical staffs at their respective hospitals. 42 U.S.C.A. § 1983.

[33] KeyCite this headnote

78 Civil Rights

78II Employment Practices

78k1118 k. Practices Prohibited or Required in General; Elements. Most Cited Cases

Elements of a prima facie case under § 1981 are the same as those under Title VII. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[34] KeyCite this headnote

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1007 Bases of Discrimination and Classes Protected

78k1009 k. Race, Color, Ethnicity, or National Origin. Most Cited Cases

78 Civil Rights KeyCite this headnote

78I Rights Protected and Discrimination Prohibited in General

78k1030 Acts or Conduct Causing Deprivation

78k1033 Discrimination in General

78k1033(3) k. Affirmative Action and Reverse Discrimination. Most Cited Cases

Claims for national origin discrimination or reverse national origin discrimination are not viable claims under § 1981. 42 U.S.C.A. § 1981.

KeyCite this headnote

[35]

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1030 Acts or Conduct Causing Deprivation

78k1033 Discrimination in General

78k1033(1) k. In General. Most Cited Cases

Whistleblower activities are not protected under § 1981; rather a claim for retaliation for such conduct must be brought under the appropriate whistleblower statute. 42 U.S.C.A. § 1981.

[36] KeyCite this headnote

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk268 Staff Privileges and Peer Review

198Hk274 k. Liability or Immunity. Most Cited Cases

Purpose of immunity provision of the Health Care Quality Improvement Act (HCQIA) is to grant immunity from monetary damages to those persons participating in professional peer review activities in order to deter anti-trust suits by disciplined physicians. Health Care Quality Improvement Act of 1986, § 411, 42 U.S.C.A. § 11111.

[37] KeyCite this headnote

13 Action

13I Grounds and Conditions Precedent

13k3 k. Statutory Rights of Action. Most Cited Cases

Section of Health Care Quality Improvement Act (HCQIA) establishing guidelines for assuring that those involved in the peer review process receive immunity does not create the basis of a cause of action for a physician who has been subject to a peer review process. Health Care Quality Improvement Act of 1986, § 412, 42 U.S.C.A. § 11112.

[38] KeyCite this headnote

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk14.1 k. In General. Most Cited Cases

Although a district court assumes supplemental jurisdiction over some claims, a district court does not assume supplemental jurisdiction over claims that a plaintiff chooses to bring in state court separately from the claims he brings in federal court. 28 U.S.C.A. § 1367

[39] KeyCite this headnote

334 Removal of Cases

334III Citizenship or Alienage of Parties

334k44 k. Parties Entitled to Remove in General. Most Cited Cases

Only defendants may remove an action to federal court. 28 U.S.C.A. § 1446.

**294* Russell J. Heiple, Johnstown, PA, for Plaintiff.

Alyson J. Kirleis, Frederick W. Bode, III, Kristen Hock Prex, Dickie, McCamey & Chilcote, P.C., David R. Johnson, William James Rogers, Thomson, Rhodes & Cowie, David J. Porter, Buchanan Ingersoll, Pittsburgh, PA, Mary Kay Brown, Buchanan Ingersoll, Philadelphia, PA, for Defendants.

MEMORANDUM OPINION

and

ORDER OF COURT

GIBSON, District Judge.

SYNOPSIS

This matter comes before the Court on the following motions: Motion to Dismiss Plaintiff's Second Amended Complaint [FN1] by Erden Fikri, Dinesh Mathur, Vincent Fiorica, Terry Wahl, David R. Davis, Sanders Ergas, P. James Ridella, Bhaskaran Murali, Will H. Farthing, Brian Gunnlaugson, Richard Cartwright, Denise Weisbrodt, William M. Carney, Harvey Slater, George H. Benz, Jr., Stewart M. Flam, R. Joseph Federowicz, Dickey McCamey & Chilcote, P.C., UPMC Health System and UPMC Lee Regional (hereinafter sometimes referred to as "Lee Defendants") (Document No. 136), their Brief in Support (Document No. 137) and their Revised Exhibits in Support (Document No. 142); Motion to Amend the Caption by Richard Saluzzo, Jacob Kolff, Bruce Duke, Narendra Pai, William Fritz, Paul Weygandt, William M. Carney, Robert D. Fry, Conemaugh Health System and Memorial Medical Center (hereinafter sometimes referred to as "Conemaugh Defendants") (Document No. 138); Motion to Dismiss, or, in the Alternative, for Summary Judgment with Respect to Plaintiff's Second Amended Complaint by Conemaugh Defendants (Document No. 139), their Brief in Support (Document No. 140) and their Appendix to their Brief in Support (Document No. 141); Plaintiff's Cross Motion for Summary Judgment, Injunc-

tive Relief [FN2] and for the Court's Assumption of Supplemental Jurisdiction (Document No. 146) and his Brief in Support (Document No. 147); Conemaugh Defendants' Response to Plaintiff's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's Assumption of Supplemental Jurisdiction (Document No. 151) and their Brief in Support (Document No. 152); Lee Defendants' Response to Plaintiff's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's Assumption of Supplemental Jurisdiction (Document No. 154) and their Brief in Support (Document No. 155); and Motion to Dismiss Plaintiff's Second Amended Complaint by Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. ***295** (Document No. 161) and their Brief in Support (Document No. 162); and Plaintiff's Brief in Opposition to Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc.'s Motion to Dismiss (Document No. 163). For the reasons stated herein, the Defendants' Motions are granted, except the Motion to Amend the Caption which is rendered moot, and Plaintiff's Motions are denied.

FN1. As explained in Analysis, II. Legal Standard of this opinion, this pleading is also treated as a motion for summary judgment.

FN2. Despite Plaintiff's caption, he makes no claim for injunctive relief in his motion, therefore, his motion for injunctive relief is denied herein without additional discussion. (*See* Doc. No. 146).

JURISDICTION

Jurisdiction is proper in the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1331 based on federal question jurisdiction and § 1367 based on supplemental jurisdiction.

PARTIES

For purposes of this Memorandum Opinion and Order the Court has broken the Defendants into three groups based on their representation. The Lee Defendants, the Conemaugh Defendants, and Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. The main purpose of the breakdown is for ease of reference when the Court must refer to all of the Defendants in a particular group. The Court may, however, at times refer to a Defendant individually, refer to all Defendants or refer to a different, but clearly identified, group of Defendants as necessary in the circumstances.

BACKGROUND

I. MATERIAL FACTS [FN3]

> FN3. The parties failed to submit proposed statements of Material Facts Not in Dispute in compliance with Local Rule 56.1, therefore, the Court assessed the record and determined the relevant material facts.

Plaintiff began his medical career in New Jersey with the Garden State Medical Staff. *Untracht v. West Jersey Health System, et al.*, 803 F.Supp. 978, 980 (D.N.J.1992). In April 1990, Plaintiff's Garden State Medical Staff privileges were suspended. *Id.* In addition, his staff privileges at the remaining West Jersey Health System divisions were also suspended. *Id.* Plaintiff filed at least four lawsuits in state and federal court related to this turn of events. *Id.;* (Doc. No. 141, Exs. 19, 20, 22, 24). Plaintiff's federal lawsuit in New Jersey alleged violations of § 1983, the Health Care Quality Improvement Act (hereinafter "HCQIA"), Sherman Act § 1 and § 2 and tortious interference with prospective economic advantage. *Id.* at 981. The lawsuit was dismissed by the New Jersey District Court. *Untracht v. West Jersey Health System, et al.*, 803 F.Supp. 978, 978 (D.N.J.1992), *aff'd Untracht v. West Jersey Health Systems*, 998 F.2d 1006 (3d Cir.1993); *see also Untracht v. Weimann*, 141 Fed.Appx. 46, 47-49 (3d Cir.2005) (affirming the district court's dismissal of

Untracht's Complaint and holding that the Complaint, which claimed violations of § 1983 resulting from defendants' alleged violations of his due process and equal protection rights by denying his reappointment application, was inextricably intertwined with his prior adjudication).

Plaintiff subsequently went to work for Corning Hospital in New York. (Doc. No. 147, p. 3). After a short time at Corning Hospital, Plaintiff applied for privileges at hospitals in the Johnstown, Pennsylvania area. (Doc. No. 147, Ex. 1--Pl. Aff. ¶ 20).

Plaintiff applied for clinical privileges at UPMC Lee Regional Hospital (hereinafter "Lee"), Conemaugh Memorial Medical Center (hereinafter "Conemaugh") and Windber Medical Center (hereinafter "Windber"). (Doc. No. 147, Ex. 1--Pl. Aff.¶ 20). Plaintiff was granted staff privileges at Lee in late 1994. (Doc. No. 133, p. 6, ¶ 29). Although Plaintiff alleges he was recruited by Lee in order to help them ***296** compete against Conemaugh, he admits he applied for and was granted privileges at Conemaugh in early 1995, only a few months later. (Doc. No. 133, p. 6, ¶¶ 25, 29). By 1996, Windber had also granted Plaintiff staff privileges. (Doc. No. 147, p. 4 & Ex. 1--Pl. Aff. ¶¶ 20, 22). Plaintiff was reappointed at Lee in 1997. (Doc. No. 147, Ex. 1--Pl. Aff., ¶ 22). He was reappointed at Conemaugh in 1996, 1998, 2000 and 2002 and at Windber in 1998, 2000 and 2002. *Id.* At the 2000 and 2002 reappointments by Conemaugh and Windber, Plaintiff informed the respective hospitals of the actions Lee was taking against his clinical privileges that began in 1999 and provided each hospital with full documentation about every allegation that Lee had raised against him. (Doc. No. 147, Ex. 1--Pl. Aff. at ¶ 23). After reviewing the allegations, Conemaugh and Windber both reappointed him without restrictions in 2000 and 2002. (Doc. No. 147, Ex. 1--Pl. Aff.¶¶ 23, 24).

A. LEE

When Plaintiff reapplied for surgical privileges at Lee in January of 1999, the Department of Surgery Chairman,

Dr. Fikri, did not recommend a reappointment. (Doc. No. 155, Ex. A--p. 8). As a result, the Lee Medical Staff Credentials Committee (hereinafter referred to as the "Credentials Committee") hired Dr. Milburn Jessup to provide an outside review of Plaintiff's cases. (Doc. No. 155, Ex. A, p. 8).

Dr. Jessup offered a report dated September 1, 1999, in which he found that Plaintiff displayed poor judgment in two of the nine cases submitted to him for review, both of which involved fatalities. (Doc. No. 155, Ex. A, p. 8).

Upon receipt of Dr. Jessup's report, the Credentials Committee reviewed his recommendations. (Doc. No. 155, Ex. A, p. 8). By letter dated November 15, 1999, the Chairman of the Board of Directors of Lee informed the Plaintiff that his surgical privileges were being renewed for an abbreviated appointment term through July 2000 with certain requirements for continuing peer review and a request for a series of supervised operations by surgeons at UPMC Presbyterian Hospital. (Doc. No. 133, pp. 8-9, ¶ 42); (Doc. No. 155, Ex. A, p. 8). Plaintiff was required to have a second surgeon present when pancreatic or liver resections were conducted. (Doc. No. 155, Ex. A, p. 8). This became a requirement that was imposed on all surgeons at Lee at the time. (Doc. No. 155, Ex. A, p. 8).

On February 23, 2000, Plaintiff filed a Complaint in Equity in the Court of Common Pleas of Cambria County, Pennsylvania (Case No. 2000-646) (hereinafter "Untracht I"), against, two of the Defendants in this federal action, UPMC Health System, Inc. (hereinafter "UPMC") and Lee. (Doc. No. 142, Ex. A). The Complaint sought to enjoin UPMC and Lee from carrying out the peer review activities outlined in the November 15, 1999 letter to Plaintiff from the Chairman of the Board of Directors at Lee and sought money damages for the alleged breach of Lee's Bylaws by UPMC and Lee. [FN4] *Id.*

> FN4. On or about December 22, 2003, the Honorable Thomas A. Swope, Jr., of the Court of Common Pleas of Cambria County, entered an Order of Court sus-

taining Defendants' Preliminary Objections which dismissed Plaintiff's Complaint in Equity with Prejudice. (Doc. 142, Ex. G--Order

Sustaining Defendant's Preliminary Objections Case No. 2000-646).

By letter dated March 10, 2000, the Lee Board of Directors (hereinafter referred to as the "Lee Board") modified its actions relating to Plaintiff. (Doc. No. 137, p. 8). The Lee Board granted Plaintiff unrestricted clinical privileges for a two-year ***297** period retroactive to February 1, 1999. (Doc. No. 137, p. 8). The Lee Board also requested that prior to Plaintiff's next recredentialing in January 2001, Plaintiff arrange to have a series of major surgeries monitored by a surgeon not employed by Lee. (Doc. No. 137, p. 8).

By letter dated March 23, 2000, signed by Lee's Medical Director, the Chairman of the Credentials Committee and Lee's President, Plaintiff was informed that Dr. George Benz had been selected to monitor six to ten of Plaintiff's major abdominal surgeries. (Doc. No. 155, Ex. A, p. 8). The letter also informed Plaintiff that because of concerns Plaintiff had previously raised concerning peer review activities by the Lee Surgical Quality Review Committee, future issues involving Plaintiff's care of patients at Lee would be referred to Dr. Benz for review. (Doc No. 155, Ex. A, p. 8). [FN5] Dr. Benz was to submit a written and verbal report to the Credentials Committee prior to its consideration of Plaintiff's next recredentialing in January 2001. (Doc. No. 155, Ex. A, p. 8).

FN5. Dr. George Benz was recommended by Dr. Marshall Webster, a prominent surgeon at UPMC Presbyterian Hospital. (Doc. No. 155, Ex. A., p. 8). Dr. Benz graduated from the University of Pittsburgh School of Medicine in 1967, did his internship and residency at the University of Pittsburgh School of Medicine, Department of Surgery and was Board certified in general surgery. (Doc. No. 155, Ex. A., p.

8). He had been an assistant professor of Clinical Surgery at the University of Pittsburgh in the Surgical Department since 1975. (Doc. No. 155, Ex. A., p. 8). Dr. Benz retired in July of 2001, but maintained his medical license and remained Board certified in general surgery since 1973. (Doc. No. 155, Ex. A., p. 8). He had been on the staffs of Presbyterian University Hospital, Montefiore Hospital, and Forbes Health Systems since 1975. (Doc. No. 155, Ex. A., p. 8).

Forbes Regional Hospital is located in Monroeville, Pennsylvania, has 300 beds and approximately 20 to 25 surgeons on staff. (Doc. No. 155, Ex. A., p. 8). Dr. Benz was the Chief of the Section of General Surgery for seven years at Forbes, was on the Medical Executive Committee for 20 years and was the Coordinator of Surgical Teaching at the Forbes Family Practice Program from 1978 to 1995. (Doc. No. 155, Ex. A., p. 8). He was Chairman of the Operating Room Committee from 1987 to 1992 and Chairman of the

Department of Surgery from 1990 to 1998. (Doc. No. 155, Ex. A., p. 8). He was also President of the Medical Staff from 1986 to 1987. (Doc. No. 155, Ex. A., p. 8). He had been involved in the prior review of surgeons including a protracted review of a surgeon in Meadville, Pennsylvania, where he scrubbed with the doctor to observe the surgical techniques and he also monitored other surgeons at Forbes in his role as Chief of Surgery and has extensive peer review experience. (Doc. No. 155, Ex. A., p. 8-9). Additionally, he was involved in at least five or six reviews of surgeons at Forbes. (Doc. No. 155, Ex. A., p. 9).

Throughout the period between May 2000 and February 2001, Dr. Benz observed Plaintiff perform six surgeries and reviewed the medical records of six other patients on whom Plaintiff had performed surgery. (Doc. No. 155, Ex. A, pp. 8-9, 14-18). On April 8, 2001, following the review

of Plaintiff's cases, Dr. Benz wrote a letter to Terry Wahl, M.D., the Medical Director of Lee, in which he recommended that a second board certified surgeon be involved with Plaintiff in all major abdominal procedures. (Doc. No. 155, Ex. A, p. 9). Dr. Benz' recommendation was based upon his review of the records, as well as his personal observation of six operative procedures, four of which were major abdominal surgeries. (Doc. No. 155, Ex. A, p. 9).

On May 7, 2001, after Plaintiff had an opportunity to review Dr. Benz' recommendation, his request to appear before the Credentials Committee to rebut the recommendation was granted. (Doc. No. 155, Ex. A, p. 18). Subsequent to reviewing Plaintiff's thirty-three page letter, submitting ***298** it to Dr. Benz for comment and listening to Plaintiff's oral argument, the Credentials Committee recommended to the Lee Medical Staff Executive Committee (hereinafter the "Executive Committee") that Plaintiff's grant of clinical privileges be subject to the second surgeon requirement recommended by Dr. Benz. (Doc. No. 155, Ex. A, p. 18).

Lee further selected Dr. Harvey Slater to "review the reviewers." (Doc. No. 155, Ex. A, p. 9). Dr. Slater reviewed the cases under a "totality of circumstances basis." (Doc. No. 155, Ex. A, p. 10). Dr. Slater believed that the cases should not be reviewed in isolation and, in light of all the matters that he reviewed, believed the recommendation to be appropriate. (Doc. No. 155, Ex. A, p. 10).

On July 25, 2001, Plaintiff filed a Complaint for damages against Erden Fikri, M.D., Vincent Fiorica, M.D., Terry Wahl, M.D., David R. Davis, and Lee in the Court of Common Pleas of Cambria County, Pennsylvania (Case No. 2001-2718) (hereinafter "Untracht II"). (Doc. No. 142, Ex. B). All Defendants in Untracht II are Responding Defendants in this federal action. (Doc. No. 142, Ex. B). This lawsuit set forth virtually identical factual allegations and claims against the individually named defendants as were contained in Untracht I, and reiterated causes of actions against Lee and UPMC despite the existence of Untracht I. [FN6] (Doc. No. 142, Ex. B).

FN6. Preliminary Objections were sustained by Judge Swope in Untracht II on December 22, 2003, which dismissed the various Counts against the various defendants with prejudice. (Doc. 142, Ex. G--Order Sustaining Defendants' Preliminary Objections Case No. 2001-2718). As noted earlier, Judge Swope also sustained preliminary objections in Untracht I on December 22, 2003. *See* Footnote 3.

By letter dated July 13, 2001 from Lee's President and CEO, David R. Davis, Plaintiff was informed that the Executive Committee had voted to recommend to the Board of Directors that Plaintiff's clinical privileges be subject to the restriction that a second surgeon be involved in all major abdominal surgeries. (Doc. No. 155, Ex. A, p. 1). The letter also informed Plaintiff that under the Medical Staff Bylaws, Plaintiff could request a hearing before a panel of physicians prior to the recommendation being forwarded to the Board. *Id.*

On August 8, 2001, Plaintiff filed a Petition for Preliminary Injunction in Untracht I seeking to enjoin Lee and UPMC from taking action to impose or enforce the condition that he have a second surgeon present for major abdominal surgeries. (Doc. 142, Ex. C). On September 17, 2001, Lee and UPMC filed, in Untracht I, a Motion to Dismiss the Petition for Preliminary Injunction, or in the Alternative to Stay Proceedings Pending Exhaustion of Plaintiff's Internal Remedies Under Lee's Medical Staff Bylaws. (Doc. 155, Ex. A to Ex. B, p. 2).

By letter dated August 14, 2001 to the President of Lee, Plaintiff requested a hearing under Lee's Medical Staff Bylaws. (Doc. No. 155, Ex. A, p. 1). Dr. Ian Katz, Dr. Johnnie Barto and Dr. John J. Seeber, were appointed by Lee as a hearing panel (hereinafter the "Hearing Panel"). (Doc. No. 155, Ex. A, p. 1) These medical staff members did not actively participate in consideration of the matter at the Medical Staff Committee level and were not in direct economic competition with Plaintiff. (Doc. No. 155,

Ex. A, p. 1). Both parties accepted the Hearing Panel before the proceedings began. (Doc. No. 155, Ex. A, p. 1).

The Court of Common Pleas of Cambria County issued an Order dated November 20, 2001, "staying all proceedings before the Court pending completion of the internal ***299** remedies afforded Plaintiff under [ ] Lee Hospital's Medical Staff Bylaws." (Doc. No. 142, Ex. D). Additionally, the Court enjoined Lee from filing a report with the National Practitioner Data Bank (hereinafter "Data Bank") until permitted to do so by the Court. (Doc. No. 142, Ex. D).

On or about November 30, 2001, the internal hospital hearing requested by Plaintiff began. (Doc. No. 155, Ex. A, p. 2). The appointed hearing officer was Daniel W. Rullo, Esquire, who presided over the hearings. (Doc No. 155, Ex. A, p. 1). Hearings were held on December 1, 2001, December 4, 2001, December 14, 2001, January 4, 2002, January 5, 2002, January 12, 2002, and January 23, 2002. (Doc No. 155, Ex. A, n. 1-2). Plaintiff was represented by legal counsel at these hearing sessions. (Doc No. 155, Ex. A, n. 1-2). During these first eight hearing sessions, [FN7] Hearing Officer Rullo made certain rulings on the admissibility of evidence and other procedural issues. (Doc. No. 137, p. 11). As part of the proceedings, testimony about surgeries performed by Plaintiff after the recommendation that a second surgeon be present at all major abdominal surgeries performed by Plaintiff had been rendered was introduced and extensively rebutted by Plaintiff. (Doc. No. 155, Ex. A to Ex. B, p. 1).

> FN7. A total of nineteen hearing sessions were held over thirteen and a half months before the Hearing Panel. (Doc. No. 155, Ex. A to Ex. B, p. 1). Both Plaintiff and Lee were given ample opportunity to present evidence in support of their respective positions. (Doc. No. 155, Ex. A to Ex. B, p. 1). The transcript of the hearing record is over 3000 pages long and includes over 200 exhibits. (Doc. No. 155, Ex. A, p. 2).

On March 11, 2002, in Untracht I, Plaintiff filed a Motion on Pending Internal Fair Hearing, requesting the Court of Common Pleas of Cambria County to review and overturn certain rulings that had been made by Hearing Officer Rullo in the internal Lee hearings. (*See* Doc. No. 142, Ex. E). By Order dated March 19, 2002, Plaintiff's motion was denied and the Court of Common Pleas of Cambria County stated that it would "not intervene in the ongoing hearing process." (Doc. 142, Ex. E).

Thereafter, further internal hearing sessions were held on March 22, 2002, April 17, 2002, April 24, 2002, and May 2, 2002. (Doc. No. 155, Ex. A, n. 2). Plaintiff represented himself at these sessions after he and his attorneys ended their attorney-client relationship. (Doc. No. 155, Ex. A, n. 1).

On June 20, 2002, despite the stay of all proceedings by the Court of Common Pleas of Cambria County in Untracht I, Plaintiff, for the third time, sought judicial intervention into the internal Lee peer review process by filing a Motion to Order Defendants to Produce Documents, Compel Testimony, and Comply With Accepted Standards of Review. (*See* Doc. No. 142, Ex. E). On July 17, 2002, the Court of Common Pleas of Cambria County denied Plaintiff's Motion and again stated it would not intervene in Lee's ongoing internal hearing process. (Doc. No. 142, Ex. F).

Further internal hearing sessions were held at Lee on May 2, 2002, August 14, 2002, August 15, 2002, October 8, 2002, November 14, 2002, November 20, 2002, December 16, 2002, and January 15, 2003. (Doc. No. 155, Ex. A, n. 2). A total of nineteen hearing sessions were held. (Doc. No. 155, Ex. A, p. 2).

In the midst of these final internal hearing sessions, on or about November 13, 2002, Plaintiff filed a writ of summons in the Court of Common Pleas of Cambria County, Pennsylvania (Case No. 2002-3825) against Dr. Benz, Dr. Ridella, Dr. Fiorica, Dr. Ergas, Dr. Farthing, Dr. Gunnlaugson, Ms. Weisbrodt, Mr. Davis, ***300** Lee, UPMC and Dr. Slater. (Doc No. 141, Pl. Depo., Ex. 31)

(hereinafter "Untracht III."). This was the third lawsuit filed by Plaintiff in Cambria County dealing with the same series of events. (*Id.; See* Doc. No. 142, Ex. A, B).

On March 7, 2003, following completion of the nineteen hearing sessions, the Hearing Panel unanimously found that the recommendation of the Credentials Committee and Executive Committee that Plaintiff have a second surgeon for all major abdominal surgeries was proper; was supported by substantial evidence; and should be implemented. (Doc. No. 155, Ex. A, p. 23). In accordance with Hearing Officer Rullo's interpretation of the Lee Bylaws, the Hearing Panel's only options were to accept or reject the recommendation that a second surgeon be present with Plaintiff whenever he performed major abdominal surgery. (Doc. No. 155, Ex. A to Ex. B, p. 1). The Hearing Panel unanimously accepted the recommendation. (Doc. No. 155, Ex. A, p. 23). The Hearing Panel found that Plaintiff often lacked sound medical judgment, had not been inclined to accept criticism and may not recognize his limitations or the limitations of the facility in which he operates. (Doc. No. 155, Ex. A, pp. 22-23).

Plaintiff appealed the Hearing Panel's recommendation to the Lee Board. (Doc. No. 155, Ex. A to Ex. B, p. 2); (Doc. No. 147, Ex. 15). An appellate review panel was appointed by the Lee Board to review Plaintiff's appeal (hereinafter the "Appellate Review Panel"). (Doc. No. 155, Ex. A to Ex. B, p. 2). The Appellate Review Panel met on April 9, 2003, and reviewed the evidence and transcript from the hearing sessions and the report of the Hearing Panel. (Doc. No. 147, Ex. 15--Letter from Chairman of the Board of Trustees of Lee to Plaintiff dated June 24, 2003, p. 1). The Appellate Review Panel concluded that Plaintiff's behavior could not be corrected by merely requiring a second surgeon. (Doc. No. 155, Ex. A to Ex. B, p. 1). The Appellate Review Panel recommended that, for the protection of Lee's patients, Plaintiff's application for reappointment should be denied and his staff privileges should be terminated. [FN8] (Doc. No. 155, Ex. A to Ex. B, p. 2).

FN8. The Appellate Review Panel acknowledged that

> the Hearing Panel had no authority to impose a more stringent sanction on Plaintiff, but recognized that the Board did have the ultimate authority to assure the competency of its medical staff and protect its patients. (Doc. No. 147, Ex. 15--Letter from Chairman of Board of Trustees of Lee to Plaintiff dated
>
> June 24, 2003, p. 1). Therefore, the Review Panel concluded that the evidence against Plaintiff presented during the hearing, much of which post dated the original recommendations of the Credentials and Executive Committees, supported a more stringent sanction than had originally been recommended. *Id.* at 2.

On May 5, 2003, the Lee Board adopted the recommendation of its Appellate Review Panel. (Doc. No. 147, Ex. 15, p. 1). By letter dated May 6, 2003, Plaintiff was advised of the Lee Board's decision to consider terminating his staff privileges. (Doc. No. 147, Ex. 15, p. 2).

The Lee Board then directed a joint committee of the Board and medical staff (hereinafter the "Joint Committee") to consider the Appellate Review Panel's recommendation that Plaintiff's staff privileges be terminated. (Doc. No. 155, Ex. A to Ex. B, p. 2; Doc. No. 147, Ex. 15, p. 1). After Plaintiff and the medical staff submitted written responses, further evidence, and oral arguments, the Joint Committee recommended that Plaintiff's staff privileges be terminated. (Doc. No. 155, Ex. A to Ex. B, p. 2); (Doc. No. 147, Ex. 15, p. 2). At the conclusion of Lee's fair hearing proceedings, on June 24, 2003, the Lee Board voted to terminate Plaintiff's staff privileges. (Doc. No. 147, Ex. 15, pp. 1-2); ***301** (Doc. No. 155, Ex. A to Ex. B, p. 2). The Lee Board notified Plaintiff of its decision by letter dated June 24, 2003. (Doc. No. 147, Ex. 15, pp. 1-2); (Doc. No. 155, Ex. A to Ex. B, p. 2).

On July 25, 2003, in Untracht I, Lee filed a Motion to End Injunction, Lift Stay or Grant Other Relief. (Doc. No. 155, Ex. B). Plaintiff filed a Motion to Continue. (Doc. No. 155,

Ex. C). On September 4, 2003, the Honorable F. Joseph Leahey, of the Court of Common Pleas of Cambria County denied Plaintiff's Motion to Continue in Untracht I and entered an Order vacating the Order dated December 20, 2001 that enjoined Lee and the other defendants in Untracht I from reporting the internal actions and outcomes to the Pennsylvania State Medical Board of Medical Examiners and the Data Bank. (Doc No. 147, Ex. 13).

On or about September 17, 2003, Lee made a Data Bank submission reporting that Plaintiff was denied privileges for continuing problems with poor judgment and failure to provide proper patient care. (Doc. No. 137, p. 17).

On December 22, 2003, two Orders were entered, one in Untracht I and one in Untracht II, sustaining Defendants' Preliminary Objections which dismissed Plaintiff's Complaint in Equity against Lee and UPMC with prejudice and also dismissed all the other claims against the various defendants. (Doc. No. 155, Ex. G).

B. CONEMAUGH

When Plaintiff was up for reappointment at Conemaugh in 2000 and 2002 he provided Conemaugh with full documentation of Lee's ongoing allegations. (Doc. No. 147, Ex. 1--Pl. Aff., ¶ 63). Upon review of that documentation, Conemaugh reappointed him to its medical staff in 2000 and in February of 2002. (Doc. No. 147, Ex. 1-Pl. Aff., ¶ 31). Plaintiff experienced no problems or adverse action at Conemaugh until November 22, 2002 when Plaintiff operated on an 85 year old Jehovah's Witness who was suffering from colorectal cancer. (Doc. No. 147, Ex. 1--Pl. Aff.¶ 25). The patient, Earl Esherick (hereinafter "EE"), died and on November 27, 2002, Plaintiff was informed that his clinical privileges at Conemaugh were being suspended because of this patient's death. (Doc. 147, Ex. 1--Pl. Aff.¶ 25). The next day, Thanksgiving 2002, Plaintiff called Dr. Saluzzo and informed him that Plaintiff felt the patient's death was the fault of the anesthesiologists. (Doc. No. 147, Ex. 1--Pl. Aff.¶ 25).

As a result of events in the operating room that led to the patient's death, and Plaintiff's attempts to blame the anesthesiologists, the Conemaugh Credentials Committee voted to revoke his clinical privileges on December 17, 2002. (Doc. No. 147, Ex. 1--Pl. Aff.¶ 33). The Conemaugh Credentials Committee based its recommendation on four findings: 1) Plaintiff mismanaged the care of EE; 2) Plaintiff's poor judgment was responsible for the death of EE; 3) Plaintiff behaved unprofessionally and non-collegially by attempting to shift blame for EE's death back to the anesthesiologists and others; and 4) Plaintiff violated a Conemaugh Medical Staff bylaw by not signing a third-party release. (Doc. No. 133, p. 18, ¶ 86).

On December 19, 2002 Plaintiff informed EE's family of the wrongdoing Plaintiff felt occurred in the deceased patient's care, including that the anesthesiologists were at fault, and Plaintiff assisted the family in finding an attorney to sue to protect their rights. (Doc. No. 133, p. 19, ¶ 88).

In response to Conemaugh's vote to revoke his privileges, Plaintiff participated in Conemaugh's fair hearing process. (Doc. No. 147, Ex. 1--Pl. Aff. ¶ 25; Ex. 10). The hearings were conducted between ***302** March 10, 2003 and May 21, 2003. (Doc. No. 147, Ex. 1--Pl. Aff. ¶ 25; Ex. 10).

During the Conemaugh fair hearing process, Plaintiff called witnesses and presented evidence and Conemaugh made a determination to suspend and/or revoke his staff privileges. (Doc. No. 147, Ex. 1--Pl. Aff., p. 8, ¶ 38). The Conemaugh hearing panel determined revocation of Plaintiff's privileges was warranted based on the unprofessional nature of Plaintiff's communications with EE's family. (Doc. No. 133, p. 19, ¶ 92).

Subsequently, Attorney Alan H. Perer, the attorney contacted by Plaintiff on behalf of EE's family, filed suit of behalf of the personal representative of EE's estate against Conemaugh and Plaintiff (no anesthesiologist or other doctors), alleging negligence on the part of Plaintiff and negligence on Conemaugh's part in granting clinical privileges to Plaintiff. (Doc No. 133, p. 20, ¶ 96; Doc. No.

147, Ex. 1--Pl. Aff. ¶ 43). The parties agreed to binding high-low arbitration, which meant that Conemaugh and Plaintiff would have to pay regardless of the outcome and the arbitration was only to determine in what amount. (Doc. No. 133, p. 20, ¶ 97). The arbitration was held March 10, 2005. (Doc. No. 147, Exs. 8, 9). Despite the fact the arbitrator awarded $375,000 to the deceased patient's personal representative, Plaintiff elects in his pleadings to this Court to characterize this as a ruling in his favor. (Doc. No. 133, p. 20, ¶ 97; Doc. No. 147, p. 20).

On or about June 9, 2003, Conemaugh made submissions to the Data Bank regarding Plaintiff on the basis of substandard and inadequate care, poor clinical judgment and unprofessional behavior. (Doc. No. 147, Ex. 22).

C. WINDBER

[1] Plaintiff had privileges at Windber, which is located ten miles from Lee and eight miles from Conemaugh. Mapquest, *www.mapquest.com*, (last visited July 27, 2006). [FN9] Windber never had any problems with Plaintiff's patient care. (Doc. 147, Ex. 1--Pl. Aff., ¶ 61). Plaintiff informed Windber of the actions taken against his clinical privileges at Lee and after review of the allegations, Windber reappointed him without restrictions in 2002. (Doc. 147, Ex. 1--Pl. Aff., ¶ 24). In August of 2002, however, Plaintiff voluntarily resigned his privileges at Windber. (Doc. No. 147, Ex. 1--Pl. Aff., ¶ 60; Doc. No. 137, Ex. B--Pl. Depo., p. 52, lines 10-16). When Plaintiff resigned his clinical privileges at Windber, no disciplinary actions were pending at the facility, nor were any disciplinary actions planned. (Doc. No. 147, Ex. 1-Pl. Aff., ¶ 62; Doc. No. 137, Ex. B--Pl. Depo., p. 52, lines 19-25).

> FN9. A court can take judicial notice of distances. *See Gordon v. Lewistown Hosp.*, 272 F.Supp.2d 393, 429 n. 34 (M.D.Pa.2003) (holding a court can take judicial notice of driving distances disclosed on an internet mapping service).

D. DISTRICT COURT AND REMAINING STATE COURT PROCEEDINGS

On May 14, 2003, Plaintiff filed a *pro se* complaint in the United States District Court for the Eastern District of Pennsylvania against thirty-six defendants, including individual physicians and health care professionals, a university, a law firm, two lawyers, an anesthesiology group, two health systems, four medical facilities and 20 John Doe Defendants. (Doc. No. 1). The Complaint contained 522 Paragraphs and 15 counts alleging Sherman Act violations, Section 1983 civil rights violations, tortious interference with prospective economic advantage, negligence, perjury and defamation. (Doc. No. 1).

**303* On May 14, 2003, Plaintiff also filed a Petition for Temporary Injunction in the United States District Court for the Eastern District of Pennsylvania. (Doc. No. 2). A supporting brief was filed by Plaintiff on May 20, 2003. (Doc. Nos. 3, 4). All of the Defendants filed a timely Brief in Opposition to Plaintiff's Petition for Temporary Injunction. (Doc. Nos. 14, 15, 16, 17).

All of the Defendants filed Motions to Dismiss, Motions to Strike and Motions to Transfer Venue, as well as Briefs in Support of those Motions. (Doc. Nos. 23, 24, 25, 26, 27, 28, 30, 32, 33, 35). These were filed between June 9-12, 2003. *Id.*

On June 26, 2003, Plaintiff, without leave of Court, filed an Amended Complaint. (Doc. No. 52). The Amended Complaint did not bolster the allegations against the Defendants, nor did it cure the defects in the original Complaint. *Id.* This Amended Complaint consisted of 114 pages, 15 causes of action and 655 Paragraphs. *Id.*

Between July 7 and 11, 2003, Defendants again filed Motions to Dismiss and/or Strike Plaintiff's Amended Complaint and Motions to Transfer. (Doc. Nos. 55, 56, 57, 58, 59, 61, 62, 63, 64, 65).

On July 25, 2003, the Honorable Timothy J. Savage, of the United States District Court for the Eastern District of Pennsylvania entered an Order granting the Defendants' Motions to Transfer and transferred the case *sub judice* to the Western District of Pennsylvania. (Doc. No. 80).

On December 29, 2003, in the case *sub judice* Plaintiff filed a Motion to Supplement the Pleadings and a Motion and Brief for Summary Judgment and Injunctive Relief. (Doc. Nos. 86, 87, 88).

On January 5, 2004, Plaintiff revived the November 13, 2002 writ of summons which was filed a year earlier in Untracht III and, yet again, filed a Complaint against several of the Defendants named in this federal court action, and some who were named in the previous state court actions, and asserted causes of action including defamation as a result of testimony and documents provided at the Lee internal fair hearings. (Doc. No. 136, p. 5).

On March 11, 2004, in the case *sub judice* Plaintiff filed a Motion for Leave to Amend his Complaint and Brief in Support. (Doc. No. 98).

On May 28, 2004, this Court entered a Case Management Order setting the deadlines for the case, including that discovery would close on January 7, 2005. (Doc. No. 103).

Defendants sent out timely discovery requests and scheduled and conducted Plaintiff's deposition on December 20, 2004 and December 21, 2004. (Doc. No. 141, Ex. 1). Plaintiff's deposition was to be concluded at the end of December 2004/first week of January 2005; prior to the close of discovery, but at Plaintiff's request, the discovery deadline was extended until February 14, 2005. (Doc. Nos. 112, 116). Discovery was stayed on February 10, 2005 pending the Court's decision on certain motions. (Doc. No. 126). Those motions were decided on April 7, 2005. (Doc. No. 131). Discovery, therefore, was completed on April 11, 2005.

On April 7, 2005, this Court issued an Order granting defendants' Motion to [S]trike the Amended Complaint and granting Plaintiff leave to file a Second Amended Complaint, which he did on April 25, 2005. (Doc. No. 131).

The motions currently pending before the Court were filed after the close of discovery between June 13, 2005 and October 21, 2005.

ANALYSIS

II. LEGAL STANDARD

The Lee and Conemaugh Defendants filed Motions to Dismiss, or, in the Alternative, **304* for Summary Judgment. (Doc. Nos. 136, 139). The Conemaugh Defendants' Motion (Document No. 139) is so captioned and the Lee Defendants' Brief in Support (Doc. No. 137) indicates the alternative in the first sentence of the Introduction. (Doc. Nos. 137, 139). Plaintiff responds to the Motions with a Cross Motion for Summary Judgment and Brief in Support. (Doc. Nos. 146, 147). Additionally, both Plaintiff and Defendants filed extensive exhibits with their Motions and Briefs in Support including: depositions; affidavits; prior state court pleadings and orders; and letters and other documentation related to the actions taken at Lee and Conemaugh. (Doc. Nos. 136, 137, 139, 140, 141, 142, 146, 147, 151, 152, 154, 155). Accordingly, the Court treats the motions before it as motions for summary judgment.

[2] A motion to dismiss may be converted to a motion for summary judgment if the materials submitted warrant a conversion and the parties had adequate notice. *In Re Rockefeller Center Properties Inc. Securities Litig.*, 184 F.3d 280, 288 (3d Cir.1999). The Third Circuit has held that the parties have adequate notice where some of the motions to dismiss are framed in the alternative as motions for summary judgment. *Hilfirty v. Shipman*, 91 F.3d 573, 578-79 (3d Cir.1996).

In the case *sub judice* the Court has no question that the parties had notice that the Motions to Dismiss would be treated, in the alternative, as Motions for Summary Judgment. The Motions to Dismiss were denoted as Motions for Summary Judgment in the alternative in either the caption of the Motion or the first sentence of the Introduction of the Brief in Support. (Doc. Nos. 137, 139). Plaintiff responded with a Cross Motion for Summary Judgment indicating it was clear to him Motions for Summary Judgment had been filed by the Defendants.

(Doc. No. 146). Finally, the parties attached extensive exhibits to their Motions. (Doc. Nos. 136, 137, 139, 140, 141, 142, 146, 147, 151, 152, 154, 155). Accordingly, the Court treats the motions as Motions for Summary Judgment except in two instances where a Motion to Dismiss is a more appropriate manner in which to address the issue. [FN10]

> FN10. These instances involve Plaintiff's § 1981 claim for reverse national origin discrimination and Plaintiff's 42 U.S.C. § 11112 claim and are discussed more fully later in this Memorandum Opinion and Order.

A. MOTION TO DISMISS STANDARD

In analyzing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6):

the district court [is] required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant. *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir.1989); *D.P. Enters., Inc. v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir.1984). In determining whether a claim should be dismissed under Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record. Moreover, a case should not be dismissed for failure to state a claim unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984); *D.P. Enters.*, 725 F.2d at 944.

Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.1994). The defendant bears the burden to demonstrate that the complaint fails to state a ***305** claim. *Gould Electronics Inc. v. U.S.*, 220 F.3d 169, 178

(3d Cir.2000) (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991)).

B. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when it is demonstrated that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-32, 106 S.Ct. 2548, 2552-57, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In deciding a motion for summary judgment, all reasonable inferences must be drawn in favor of the non-movant. *Oritani [Sav. & Loan Ass'n v. Fidelity & Deposit Co.*, 989 F.2d 635, 638 (3d Cir.1993)]. *Troy Chem. Corp. v. Teamsters Union Local No. 408*, 37 F.3d 123, 125-126 (3d Cir.1994).

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *See generally* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

III. DISCUSSION

A. COLLATERAL ESTOPPEL OR CLAIM PRECLUSION

1. Defendant's Assertion of Collateral Estoppel or Claim Preclusion

[3] Defendants assert that all claims before the Court in the case *sub judice* are barred by collateral estoppel or claim preclusion because Plaintiff should have asserted such claims in one of his previously filed and dismissed state court cases. The cases to which Defendants refer are Untracht I and II, both of which were dismissed on the basis of preliminary objections. (Doc. No. 142, Ex. G). Defendant judicially admits in Untracht I and Untracht II that "[t]he federal action includes all of the same claims presently before this Court." (Doc. No. 155, Ex. 2, p. 3). However, the Orders dismissing Untracht I and Untracht II do not specify on which preliminary objection the cases were dismissed and Defendants do not clarify this for the Court. (Doc. No. 142, Ex. G). Furthermore, the Defendants present no argument to the Court suggesting that the preliminary objections were an adjudication on the merits. *See Parking Auth. of the City of Wilkes-Barre v. Ten East South Street Co.*, 788 A.2d 1096, 1100-01 (Pa.Cmwlth.2001) (holding dismissal on preliminary objections was not an adjudication on the merits and collateral estoppel ***306** did not apply). Since the preliminary objections on which the cases were dismissed are relevant to whether this Court can apply collateral estoppel or claim preclusion and since no argument is made that the preliminary objections constituted an adjudication on the merits, viewing the facts before it in the light most favorable to the Plaintiff, the Court cannot dismiss Plaintiff's claims on this basis.

2. Plaintiff's Assertion of Collateral Estoppel

First, Plaintiff moves for summary judgment in his favor against Conemaugh based on his assertion that Conemaugh is judicially estopped by a statement it made in its Answer in the malpractice case filed by EE's estate

against Plaintiff and Conemaugh (hereinafter the "Malpractice Case") and by the position it took in the March 10, 2005 arbitration proceeding that it was not negligent in credentialing Plaintiff through November 22, 2002. The statement in Conemaugh's Answer in the Malpractice Case to which Plaintiff refers reads as follows:

"[I]t is denied that [Conemaugh] was negligent in credentialing Dr. Untracht. To the contrary, when Dr. Untracht was credentialed, [Conemaugh] carefully and in compliance with all hospital, state and federal regulations, did appropriately evaluate the information that was provided by Dr. Untracht requesting surgical privileges. Dr. Untracht at the time that his credentials were granted appeared to be a competent surgeon up to and including November 22, 2002 [the day of EE's operation]. At all times, [Conemaugh] exercised reasonable care in conducting an investigation into the credentials, skill, judgment and ability of Dr. Untracht up to and including November 22, 2002; The hospital did not know, nor did it have any reason to believe that there were any serious concerns or problems associated with the surgery and practice of Dr. Untracht from the time he was credentialed up to and including November 22, 2002. Further, at all times, [Conemaugh] acted in an appropriate fashion with regard to all patients ... it is denied that [Conemaugh] had any information prior to the surgery performed by Dr. Untracht on Earl Esherick on November 22, 2002, that would have warranted a suspension or other action with regard to the privileges of Dr. Untracht." (Doc. No. 147, Ex. 6--Conemaugh's Answer and New Matter to EE Complaint).

Plaintiff's contention, that Conemaugh should be judicially estopped as a result of its September 7, 2004 Answer in the Malpractice Case and the position it took in the March 10, 2005 arbitration proceeding that it was not negligent in credentialing Plaintiff through November 22, 2002, makes no sense. (Doc. No. 147, p. 16). First, Plaintiff never adequately explains what Conemaugh should be judicially estopped from asserting. Presumably he wants to bind Conemaugh to its denial of the allegation that Conemaugh was negligent in credentialing Plaintiff. To

begin, whether Conemaugh was negligent in credentialing Plaintiff between 1995 and November 22, 2002 is simply not an issue in the case *sub judice*. Furthermore, whether Conemaugh was negligent in credentialing Plaintiff between 1995 and November 22, 2002 is not an issue to which the doctrine of judicial estoppel is applicable.

[4][5] The doctrine of judicial estoppel prevents a litigant from asserting a position that is inconsistent with one previously taken before a court or agency. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir.1996). Application of the doctrine involves a three-part test: 1) whether the party's present position is irrevocably inconsistent with the position it asserted in the prior ***307** proceeding; 2) whether the party changed its position in bad faith; and 3) whether the use of judicial estoppel is tailored to address the affront to the court's authority or integrity. *Dam Things from Denmark; a/k/a Troll Company ApS v. Russ Berrie & Co. Inc.*, 290 F.3d 548, 559 n. 15 (3d Cir.2002).

[6] Here, the basic requirement of inconsistency is not satisfied because there is nothing inconsistent between Conemaugh's defense in its Answer in the Malpractice Case or in the March 10, 2005 arbitration proceeding that it was not negligent in credentialing Plaintiff between 1995 and November 22, 2002 and Plaintiff's removal from Conemaugh's medical staff subsequent to November 22, 2002. Additionally, the fact that Conemaugh took a position in the March 10, 2005 arbitration of the Malpractice Case that it had not been negligent in credentialing Plaintiff between 1995 and November 22, 2002 has absolutely nothing whatsoever to do with the issue of whether Plaintiff was negligent in his treatment of EE, an 85-year old patient, on November 22, 2002. Furthermore, Conemaugh's position that it was not negligent in credentialing Plaintiff between 1995 and November 22, 2002 has absolutely nothing whatsoever to do with whether he acted unprofessionally in accusing others of negligence.

Conemaugh's assertion that it acted properly when it initially credentialed Plaintiff does not constitute an admission by Conemaugh that Plaintiff acted properly

thereafter. Therefore, it is not inconsistent for Conemaugh to assert Plaintiff acted improperly, whether negligently or unprofessionally, on or after November 22, 2002. Since there is no irreconcilable inconsistency, the doctrine of judicial estoppel is not applicable.

[7] Additionally, there is no evidence that Conemaugh's assertions were accepted or adopted by any court in the course of the litigation so as to evidence bad faith on the part of Conemaugh for deviating from those assertions. *Id.* (citing *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999)). Finally, judicial estoppel is an extraordinary remedy that should be used only when a party's inconsistent behavior would result in a miscarriage of justice. *See Dam Things*, 290 F.3d at 559-60. Plaintiff makes no argument regarding how failing to apply judicial estoppel in the case *sub judice* would result in a miscarriage of justice.

[8] Second, Plaintiff asserts the March 10, 2005 arbitration result is entitled to collateral estoppel effect. (Doc. No. 147, pp. 20, 23). Plaintiff is incorrect in his assertion, the March 10, 2005 arbitration result is not entitled to collateral estoppel effect. Collateral estoppel requires that the following four factors be met: 1) the identical issue was previously adjudicated; 2) the issue was actually litigated; 3) the previous determination was necessary to the decision; and 4) the party precluded from relitigating the issue was fully represented in the prior action. *Raytech Corp. v. White*, 54 F.3d 187, 190 (3d Cir.1995).

Although the issue of Plaintiff's negligence was likely at the forefront of the matters litigated in the arbitration proceeding, Judge Murphy did not offer any explanation as to why he reached the decision he did. (Doc. No. 147, Ex. 9). Judge Murphy simply entered an award in favor of the Malpractice Case defendants, which resulted in the Malpractice Case plaintiff receiving the "low" end of the high-low arbitration, in the amount of $375,000. (Doc. No. 147, Ex. 9).

In short, Plaintiff requests that the Court declare *res judicata* "Judge Murphy's finding that Plaintiff did not

mismanage the care of Patient EE." (Doc. No. 146, p. 4). Plaintiff blatantly misrepresents to the Court the arbitration Judge's "holding" ***308** on this issue. Plaintiff interprets a judgment against him in the amount of $375,000 to mean that Judge Murphy made a "finding" that he did not mismanage the care of EE. No such finding was made. The reasoning behind Judge Murphy's decision to award Plaintiff $375,000, the low side of the high-low binding arbitration is not disclosed by Judge Murphy. (Doc. No. 147, Ex. 9). Nowhere does Judge Murphy find, state or imply that Plaintiff did not mismanage the care of EE. (Doc No. 147, Ex. 9). The Court cannot and will not declare *res judicata* a finding that simply does not exist.

B. ANTITRUST CLAIMS

1. Antitrust Standing

[9][10] To prove antitrust standing a plaintiff must show that: 1) he has suffered the type of injury the antitrust laws were intended to prevent; and 2) the injury flows from that which makes the defendant's acts unlawful. *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 429 (3d Cir.1993). The factors to be employed in a standing analysis include: 1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause the harm, with neither factor alone conferring standing; 2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; 3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; 4) the existence of more direct victims of the alleged antitrust violations; and 5) the potential for duplicative recovery or complex apportionment of damages. *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

[11] "In addition to establishing that he has suffered an antitrust injury, the plaintiff must prove that he is the most efficient enforcer of the laws." *Baglio v. Baska*, 940 F.Supp. 819, 828 (W.D.Pa.1996) (citing *Alberta Gas Chem.*

v. E.I. Du Pont De Nemours & Co., 826 F.2d 1235, 1249 (3d Cir.1987)). "Antitrust standing goes beyond the Constitutional standing requirement of 'injury in fact' and is not satisfied by the mere allegation of a causal connection between an alleged antitrust violation and harm to the plaintiff." *Mathews v. Lancaster Gen. Hosp.*, 883 F.Supp. 1016, 1045 (E.D.Pa.1995), *aff'd*, 87 F.3d 624 (3d Cir.1996). " 'An antitrust plaintiff must prove that the challenged conduct affected the prices, quantity or quality of goods or services,' not just his own welfare." *Mathews*, 87 F.3d at 641 (quoting *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir.1991)). Recovery by a private plaintiff on an antitrust claim can only be had where the loss "stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).

[12] The Defendants argue that the Plaintiff lacks antitrust standing and, therefore, may not bring a claim under the Sherman Act. (Doc. No. 137, pp. 44- 46; Doc. No. 152, pp. 9-11; Doc. No. 161, p. 4; Doc. No. 162, p. 5). The Plaintiff cites *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268 (3d Cir.1999) to argue that he has antitrust standing suggesting that his circumstances are comparable to Dr. Angelico's. The Court does not agree.

To begin, in *Angelico*, with regard to the first element, the Third Circuit assumed that Dr. "Angelico's allegation that the defendants acted in concert and with anticompetitive motive, i.e., conspired [was] true ... [and his] harm clearly resulted from the conspiracy that prevented him from competing in the market and thereby ***309** earning a living." *Angelico*, 184 F.3d at 274. This Court will make no such assumption in the case *sub judice*. Other than bare allegations, Plaintiff offers no evidence of a conspiracy, an essential part of an antitrust violation, between any of the Defendants. In fact, Plaintiff offers evidence to the Court that disproves a conspiracy. First, Plaintiff offers evidence that while the adverse actions were being taken against him at Lee he notified Conemaugh and Windber and that, upon review, each hospital renewed his clinical privileges multiple times. (Doc. 147, Ex. 1-Pl. Aff., ¶ 22, 23, 24, 31).

According to Plaintiff's own evidence, after being put on notice of the adverse actions taking place at Lee, Conemaugh and Windber renewed Plaintiff's clinical staff privileges in 2000 and in 2002. *Id.* Furthermore, Plaintiff's evidence establishes that Conemaugh only began adverse action against Plaintiff following the death of EE, one of Plaintiff's patients at Conemaugh, more than three years after Plaintiff's problems at Lee arose. *Id.* at ¶ 25. Finally, Plaintiff admits he never suffered adverse action at Windber and, in fact, voluntarily resigned from Windber. (Doc. 147, Ex. 1-Pl. Aff. ¶ 60; Ex. B--Pl. Depo. p. 52 lines 10-16).

The evidence provided by Plaintiff demonstrates that Lee and Conemaugh were not acting in concert, *i.e.*, conspiring, but were actually acting quite independently. As a result, the Court finds that Plaintiff fails to raise a genuine issue of material fact with respect to whether Defendants Lee and Conemaugh acted in concert and with an anticompetitive motive, *i.e.*, conspired. Therefore, Plaintiff does not raise a genuine issue of material fact on the first element of antitrust standing, that his alleged harm clearly resulted from a conspiracy to prevent him from competing in the market.Additionally, the Third Circuit found in *Angelico,* when addressing whether Dr. Angelico's injury was of the type the antitrust laws were meant to redress, that the injury Dr. Angelico suffered was being *shut out* of competition for anticompetitive reasons and that such an injury was among those the antitrust laws intended to prevent. *Angelico,* 184 F.3d at 274 (emphasis added). Likewise, in *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869 (3d Cir.1995), the other case cited by Plaintiff in an attempt to support his position that he has antitrust standing, the Third Circuit held that Brader had suffered the type of injury the antitrust laws intended to protect because he had been completely *shut out* of the market by a purported group boycott. *Id.* at 877 (emphasis added).

[13] In stark contrast, Plaintiff did not suffer the injury of being shut out of competition in the market. Although Plaintiff's privileges at both Lee and Conemaugh were eventually revoked Plaintiff had privileges at Windber

[FN11] which were **310* not revoked or restricted and which he admits he voluntarily resigned. (Doc. 147, Ex. 1-Pl. Aff. ¶ 60; Ex. B--Pl. Depo., p. 52, lines 10-16). Thus, Plaintiff was not, in fact, shut out from competing in the market by Defendants' actions. Rather, Plaintiff had an active avenue of competition, his staff privileges at Windber, that he chose to voluntarily foreclose. The Court finds that voluntary foreclosure of one's own opportunities for competition is not the type of antitrust injury for which the antitrust laws were designed to provide redress.

FN11. Although the relevant geographic market was not well defined by

the parties, the Court notes that at a bare minimum it includes, as Plaintiff asserts, the Johnstown area which encompasses the Windber Hospital located just eight miles from Conemaugh and ten miles from Lee. Mapquest, *http://www.mapquest.com,* (last visited July 27, 2006); *See* Gordon, 272 F.Supp.2d at 429 n. 34 (holding a court may take judicial notice of driving distances disclosed on an Internet mapping service and identifying like facilities within a 36 mile driving distance); *see also, e.g.,* *Urdinaran v. Aarons,* 115 F.Supp.2d 484, 490 (D.N.J.2000) (the relevant geographic market may include Philadelphia, approximately a one hour drive from Atlantic City Hospital at which Plaintiff practiced); *Korshin v. Benedictine Hosp.*, 34 F.Supp.2d 133 (N.D.N.Y.1999) (31 miles) (citing *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Assoc.*, 36 F.3d 664 (7th Cir.1994) (25 miles)). The Court notes that when Plaintiff moved to Johnstown he acquired privileges at Lee, Conemaugh and Windber in rapid succession further supporting the Court's determination that, at a minimum, these three hospitals are part of the relevant geographic market. (Doc. No. 147, Ex. 1--Pl. Aff.¶¶ 20, 22, 25, 29). The Court notes that this is the narrowest possible relevant geographic market and that one could easily argue the relevant geographic market includes surrounding areas such as Greensburg, Indiana, Somerset and even Pittsburgh.

Therefore, for the reasons set forth above, the Court finds that Plaintiff lacks antitrust standing and may not bring a claim under the Sherman Act. Accordingly, summary judgment is granted in favor of all Defendants on Plaintiff's Sherman Act § 1 and § 2 claims.

2. Sherman Act § 1

[14] Even if Plaintiff had antitrust standing, summary judgment is appropriate on his Sherman Act § 1 claim. Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 15 U.S.C. § 1. To establish a violation of § 1, a plaintiff must prove: 1) concerted action by the defendants; 2) that produced anti-competitive effects within the relevant product and geographic markets; 3) that the concerted actions were illegal; and 4) that he was injured as a proximate result of the concerted action. *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir.2005) (citing *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1229 (3d Cir.1993)). Absent proof of all of these elements, a Sherman Act § 1 claim cannot be maintained. *Id.*

a. *Concerted Action*

[15] The essence of a § 1 claim is the existence of an agreement. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir.1994). "For a section 1 claim, 'a plaintiff must prove concerted action, a collective reference to the contract ... combination or conspiracy.' " *Mathews*, 87 F.3d at 639 (quoting *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1131 (3d Cir.1995)). A " 'unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement' must exist to trigger section 1 liability." *Mathews*, 87 F.3d at 639 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)). Unilateral action simply does not support liability no matter what the motivation. *Mathews*, 87 F.3d at 639 (citations omitted). "Concerted action is established where

two or more distinct entities have agreed to take action against the plaintiff." Gordon, 423 F.3d at 207. "Accordingly, it requires proof of a causal relationship between pressure from one conspirator and an anticompetitive decision of another conspirator." *Id.*

A non-movant's burden in defending against a summary judgment motion in an antitrust case is no different than in any other case. *In re Flat Glass*, 385 F.3d at 357-58. "When the question involves concerted action, the non-movant may rely solely on circumstantial evidence and the reasonable inferences drawn therefrom to withstand summary judgment." ***311** Gordon, 423 F.3d at 208 (citing *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357-58 (3d Cir.2004)). "Significantly, however, 'antitrust law limits the range of permissible inferences' that can be drawn 'from ambiguous evidence.' " *Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 380 (3d Cir.2005) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538)). "To avoid deterring pro-competitive behavior, 'certain inferences may not be drawn from circumstantial evidence in an antitrust case.' " *Harrison*, 423 F.3d at 380 (quoting *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir.2003)). Mere complaints of concerted action simply are not enough. *Gordon*, 423 F.3d at 208. "There must be evidence that tends to exclude the possibility of independent action, meaning that the evidence reasonably tends to prove that the alleged conspirators had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* (citations omitted); *see Matsushita*, 475 U.S. at 590, 106 S.Ct. 1348. "Evidence of conduct that is as consistent with permissible competition as with illegal conspiracy, without more, will not support an inference of conspiracy." *Id.* (citations omitted). The reasoning behind this is that mistaken inferences in this context might result in chilling the exact conduct the antitrust laws are designed to protect. *Alvord-Polk*, 37 F.3d at 1001 (citing *Matsushita*, 475 U.S. at 594, 106 S.Ct. 1348, 89 L.Ed.2d 538).

To survive a motion for summary judgment a plaintiff must present evidence that tends to exclude the possibil-

ity that the alleged conspirators acted independently. *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (citations omitted). Furthermore, in order to survive a motion for summary judgment a plaintiff must produce economically plausible evidence supporting the elements of his claim. *Harrison*, 423 F.3d at 380 (citing *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348, 89 L.Ed.2d 538). "If the plaintiff's theory is economically senseless, no reasonable jury could find in [his] favor, and summary judgment should be granted." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468-69, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992); *Harrison*, 423 F.3d at 380.

[16] First, in the case *sub judice* Plaintiff simply provides nothing more than bald assertions of conspiracy between the doctors on staff at Lee and Lee; the doctors on staff at Conemaugh and Conemaugh; and Lee and Conemaugh. Plaintiff's assertions basically amount to the following: "Through the presentation of incorrect peer review information as to the standard of care to their [ ] Boards, Defendants [ ] Lee and Conemaugh, the named Defendant physicians and hospital agent coconspirators acquired a unity of purpose, common design and understanding, and a meeting of minds in an unlawful arrangement to exclude Plaintiff from the medical staffs to the public's detriment." (Doc. No. 133, p. 26, ¶ 121). More specifically, Plaintiff claims that they conspired to have him fired by: Lee having his 1998 reappointment withheld; Lee reviewing his past cases, where a pattern of excessive blood loss was apparent, and then alleging to its Credentials Committee that Plaintiff had poor surgical skills; Lee allegedly conducting a peer comparison profile the result of which, according to Plaintiff who has never seen the allegedly existing report, showed he was as good if not better than his peers but according to Plaintiff, Lee allegedly suppressed the report and asserted no such report was ever prepared; Lee allegedly turning the Executive Committee into a hearsay forum and not allowing Plaintiff to defend himself (an allegation Plaintiff makes in the face of clear evidence that over 13 1/2 months 19 ***312** hearings that culminated in 3000 pages of transcript were held, in which Plaintiff was given a forum to defend himself); after problems with Plaintiff's performance were recognized,

Lee obtaining Dr. Benz to review Plaintiff's cases allegedly "pursuant to standards different than those applicable to his peer group"; Lee allegedly implementing new Medical Staff Bylaws in January 2000 specifically to prejudice Plaintiff; Lee allegedly earmarking faulty surgical equipment for Plaintiff's exclusive use that it knew or should have known was likely to cause fatal complications to Plaintiff's patient; Lee allegedly through Dr. Fritz soliciting Conemaugh through Dr. Saluzzo and Dr. Weygandt to revoke Plaintiff's staff privileges in 2001; Lee allegedly requesting Conemaugh and Windber to reverse their favorable policies toward Plaintiff "as *quid pro quo* for [ ] Conemaugh to acquire [ ] Lee"; and the Conemaugh doctors allegedly conspiring to have him fired following EE's death. (Doc. No. 133, pp. 8-13; 16-19).

Plaintiff provides no evidence to substantiate these allegations. These mere complaints of concerted action simply are not enough. First, the actions of the doctors on staff at Lee who suggested peer review and those who participated in the peer review process and the subsequent action of Lee, in undertaking peer review in an effort to curtail risk and potential loss of life to its patients, fail to demonstrate that there was a conscious commitment by the medical staff to coerce Lee into accepting its recommendation and, therefore, does not exclude the possibility that Lee acted independently in its peer review activities. *See* Gordon, 423 F.3d at 209 (affirming grant of summary judgment where doctor did not raise a genuine issue of material fact that other doctors coerced the hospital into revoking his staff privileges and there was no evidence to exclude the possibility that the hospital acted independently in undertaking progressive peer review, thus precluding an inference of antitrust conspiracy). Likewise, the actions of the doctors at Conemaugh in suggesting peer review following the death of EE, the participation of other doctors in the peer review process and the subsequent action of Conemaugh in undertaking peer review and making a recommendation, fail to demonstrate that there was a conscious commitment by the medical staff to coerce Conemaugh into accepting its recommendation and, therefore, does not exclude the possibility that Conemaugh acted independently in its peer review activi-

ties. *See* Gordon, 423 F.3d at 209 (quoting *Mathews*, 87 F.3d at 639-40 ("[s]imply making a peer review recommendation does not prove the existence of a conspiracy [among the hospital and its staff]; there must be something more such as a conscious commitment by medical staff to coerce the hospital into accepting its recommendation[ ]")). "[ ] [P]eer review actions, when properly conducted, generally enhance competition and improve the quality of medical care." *Id.* (citing *Mathews*, 87 F.3d at 640).

Finally, Plaintiff sets forth absolutely no evidence of concerted action between Lee and Conemaugh. In fact, Plaintiff provides evidence to the Court that demonstrates an utter lack of conspiracy between Lee and Conemaugh. Lee undertook its peer review actions more than three years before Conemaugh began its peer review actions against Plaintiff. (Doc. No. 133, p. 10, ¶ 46). Plaintiff, in his affidavit, states that he informed Conemaugh of the adverse actions being taken against him at Lee and that after fully reviewing this information Conemaugh reappointed him in 2000 and 2002. (Doc. No. 147, Ex. 1-- Pl. Aff., ¶¶ 22, 23, 31). Furthermore, Plaintiff states that adverse action by Conemaugh did not begin until November [22], 2002 and was the direct result of the death of one of Plaintiff's patients. (Doc. ***313** No. 147, Ex. 1--Pl. Aff., ¶ 25). Finally, Plaintiff presents absolutely no evidence to support his allegation that Lee required Conemaugh to get rid of Plaintiff as a "*quid pro quo*" for Lee acquiring Conemaugh.

The evidence provided by Plaintiff demonstrates that Lee and Conemaugh were not undertaking concerted action with a unity of purpose or a common design and understanding or meeting of the minds, but rather were acting independently and in response to specific occurrences at their respective hospitals. *See* Gordon, 423 F.3d at 208 ("The whole of the evidence simply does not exclude the possibility that the Hospital acted independently in undertaking its professional review actions[ ]"). As a result, the Court finds that Plaintiff fails to establish a genuine issue of material fact that either the doctors on staff at Lee or the doctors on staff at Conemaugh coerced

their respective hospitals into revoking his privileges or that Lee and Conemaugh engaged in concerted activity coercing the other hospital to revoke Plaintiff's privileges. Accordingly, the Court finds that, even if the Plaintiff had antitrust standing, all Defendants are entitled to summary judgment on Plaintiff's Sherman Act § 1 claim based on Plaintiff's failure to raise a genuine issue of material fact on the issue of concerted activity or conspiracy. Additionally, given that the Court finds no evidence of concerted action on the record, no genuine issue of material fact exists on the third element of a Sherman Act § 1 claim, whether or not those concerted actions were illegal.

b. *Anticompetitive Effects Within the Relevant Geographic and Product Market*

[17] The second element, anticompetitive effects within the relevant geographic and product market, may be proven in two ways:

"The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services. Due to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make. Accordingly, the Courts allow proof of the defendant's 'market power' instead. Market power--the ability to raise prices above those that would prevail in a competitive market--is essentially a 'surrogate for detrimental effects.' " *Angelico*, 184 F.3d at 276 (citing *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir.1996)).

Plaintiff asserts that the relevant geographic market is the Johnstown area. (Doc. No. 147, p. 51). The Court finds that at an absolute minimum the relevant geographic market is the Johnstown area which includes Lee, Conemaugh and Windber. The relevant product market is not defined by either party, but seems to the Court to be general surgery.

[18] Although Plaintiff makes numerous allegations Plaintiff provided no actual evidence showing anticom-

petitive effects in the Johnstown area as a result of the peer review actions taken at Lee beginning in about 1999 and at Conemaugh beginning in November of 2002. Furthermore, according to Plaintiff's evidence, he retained privileges at Windber where no adverse actions were taken against him. (Doc. No. 147, Pl. Aff.¶¶ 61, 62). Thus, Plaintiff remained competitive in the relevant geographic and product market. Plaintiff elected to resign his privileges at Windber thereby voluntarily removing himself from the relevant geographic and product market. (Doc. No. 147, Ex. 1--Pl. Aff. ¶ 60; Ex. B--Pl. Depo., p. 52 lines, 10-16). Essentially, therefore, Plaintiff's voluntary choice to resign his privileges at Windber **314* ultimately created the anticompetitive effects, if any, on the market. Prior to his voluntary resignation, Plaintiff could have continued to compete and treat patients in the relevant geographic and product market. Therefore, Plaintiff fails to meet his burden of creating a genuine issue of material fact on the second element of a Sherman Act § 1 claim, that the concerted action [FN12] resulted in anticompetitive effects in the relevant geographic and product market. Accordingly, even if Plaintiff had standing to bring an antitrust claim, the Court finds summary judgment in favor of the Defendants on Plaintiff's Sherman Act § 1 claim is proper.

> FN12. The Court notes that as discussed in detail in subsection (a) of this section Plaintiff also fails to create a genuine issue of material fact regarding concerted action among the Defendants.

c. *Plaintiff Suffered Antitrust Injury as Result of Concerted Action*

[19] The fourth element of a Sherman Act § 1 claim requires Plaintiff to prove he was injured as a proximate result of the concerted action. [FN13] *Gordon*, 423 F.3d at 207 (citations omitted). In antitrust cases, a plaintiff must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Alberta Gas Chemicals Ltd. v.*

E.I. Du Pont De Nemours & Co., 826 F.2d 1235, 1240 (3d Cir.1987) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)). In other words, since "antitrust law aims to protect competition, not competitors, [a court] must analyze the antitrust injury question from the viewpoint of the consumer." *Id.* at 1241. " ' "An antitrust plaintiff must prove that [the] challenged conduct affected the prices, quantity or quality of goods or services," ' not just his own welfare." *Mathews*, 87 F.3d at 641 (quoting *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir.1991)).

> FN13. Again, the Court notes that as discussed in detail in subsection (a) of this section Plaintiff also fails to create a genuine issue of material fact regarding concerted action among the Defendants.

As discussed earlier, the actions of Defendants did not foreclose Plaintiff from competing in the relevant market, in that he retained privileges at Windber, located no further than ten miles from Lee and Conemaugh. (Doc. No. 141, Ex. B--Pl. Depo., p. 52, lines 10-16); Mapquest, http://www.mapquest.com (last visited July 27, 2006); *See Gordon*, 272 F.Supp.2d at 429 n. 34 (holding a court may take judicial notice of driving distances disclosed on an Internet mapping service and identifying like facilities within a 36 mile driving distance); *see also, e.g., Urdinaran v. Aarons*, 115 F.Supp.2d 484, 490 (D.N.J.2000) (the relevant geographic market may include Philadelphia, approximately a one hour drive from Atlantic City Hospital at which Plaintiff practiced); *Korshin v. Benedictine Hosp.*, 34 F.Supp.2d 133 (N.D.N.Y.1999) (31 miles) (citing *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Assoc.*, 36 F.3d 664 (7th Cir.1994) (25 miles)). Plaintiff admits in his affidavit and his deposition that he voluntarily resigned from Windber when he was not subject to any adverse actions and had not experienced any problems there. (Doc. No. 147, Ex. 1--Pl. Aff. ¶¶ 61, 62; Doc. No. 141, Ex. B--Pl. Depo., p. 52, lines 10-16). Plaintiff voluntarily withdrew himself from the

market. Prior to Plaintiff's voluntary withdraw from the market, consumers had the same goods and services (an option for surgery performed by Plaintiff) available to them in the market as they had before the peer review actions taken by Lee and Conemaugh. Voluntary withdraw from the relevant market is simply **315* not the type of injury that the antitrust law is meant to protect.

Therefore, even if Plaintiff had standing to bring an antitrust claim, the Court finds Plaintiff fails to establish a genuine issue of material fact regarding the fourth element of his Sherman Act § 1 claim, that he suffered an antitrust injury as a result of Defendants' actions and that the Defendants are entitled to judgment as a matter of law. Accordingly, summary judgment in favor of Defendants on this issue is proper. *See Mathews*, 87 F.3d at 641 (affirming district court's grant of summary judgment where district court found the evidence did not support the existence of an antitrust injury resulting from a restriction on Dr. Matthews's privileges at Lancaster General because orthopedic services were still readily available to consumers in the area; the district court also pointed out that the Board's restrictions on Dr. Matthews privileges *did not completely extinguish Dr. Matthews' ability to provide services,* but merely curtailed his ability to perform spine surgery at Lancaster General)(emphasis added).

3. Sherman Act § 2

[20] Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize and conspiracies to monopolize any part of interstate trade or commerce. 15 U.S.C. § 2. Plaintiff alleges a conspiracy to monopolize under § 2 of the Sherman Act. (Doc. 133, pp. 27-28, ¶¶ 126-130). Claims for conspiracy to monopolize under § 2 of the Sherman Act require evidence of a conspiracy. *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 n. 16 (2005). In a conspiracy to monopolize claim under § 2 of the Sherman Act, the plaintiff must prove: 1) an agreement or understanding between two or more parties; 2) a specific intent to monopolize; and 3) overt acts in furtherance of the

alleged conspiracy. *Robinson v. Magovern*, 521 F.Supp. 842, 892 (W.D.Pa.1981).

[21] Plaintiff alleges that there was a § 2 violation because the doctors and hospitals conspired to end his surgical career. (Doc. No. 133, pp. 27-28, ¶¶ 126-130). As fully discussed previously, Plaintiff has failed to establish a genuine issue of material fact regarding an agreement between any of the Defendants.

Next, Plaintiff states that "[Lee and Conemaugh's] intent to monopolize through buyout is not pled as illegal by the Plaintiff, rather he pleads that his exclusion from the market as a condition precedent to said buyout, or at least associated with the buyout, is illegal and a violation of federal antitrust laws as pled." (Doc. No. 147, p. 54). Plaintiff clearly indicates that he is not alleging the merger between Lee and Conemaugh is illegal. Plaintiff pleads that his exclusion from the market as a condition precedent to the buyout is a violation of § 2 of the Sherman Act. Plaintiff believes that Lee required Conemaugh to get rid of Plaintiff as a *"quid pro quo"* for Conemaugh acquiring Lee. (Doc. No. 133, p. 17, ¶ 78). Plaintiff provides not one iota of evidence that a condition precedent to the merger between Lee and Conemaugh was that Conemaugh get rid of Plaintiff. The allegation borders on the absurd, in that it requires acceptance of the circumstance that the exclusion of Plaintiff from the market was an essential factor in completing a merger of two major hospitals, and the Court will address it no further than to say absolutely no evidence was provided to support this allegation. Without evidence, no genuine issue of material fact exists.

Therefore, even if the Plaintiff had standing to bring an antitrust claim, the Court finds Plaintiff has not established a genuine issue of material fact on his claim of conspiracy to monopolize under § 2 of the Sherman Act and the Defendants are entitled to judgment as a matter of law. ***316** Accordingly, the Court finds summary judgment in favor of the Defendants is proper on Plaintiff's Sherman Act § 2 claim.

B. § 1983 CLAIM

[22] Plaintiff brings a claim for violation of 42 U.S.C. § 1983 against UPMC, Lee, Conemaugh, Dr. Kolff, Dr. Saluzzo, Dr. Ergas, Dr. Fikri, Dr. Fiorica, Dr. Benz, Dr. Slater, Dr. Carney and Ms. Weisbrodt (hereinafter sometimes referred to as "the § 1983 Defendants"). Section 1983 provides a cause of action for "any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of state law." *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir.2002). To recover under § 1983, a plaintiff must establish: 1) that the conduct complained of was committed by a person acting under color of state law; and 2) that as a result of this conduct plaintiff was deprived of rights, privileges or immunities secured by the Constitution or the laws of the United States. [FN14] *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40; *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). To satisfy the state action requirement under § 1983, a plaintiff must prove that the alleged violations are "fairly attributable to the state" and courts require careful adherence to the state action requirement because it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial powers." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

> FN14. Plaintiff alleges that the § 1983 Defendants acted under color of state law while exercising their peer review responsibility pursuant to federal law (HCQIA) and the fourteenth amendment of the United States Constitution. (Doc. No. 133, pp. 20-21, ¶ 99). Plaintiff argues he was denied free speech, due process and equal protection through the § 1983 Defendants' "deliberate indifference to fundamental Constitutional due
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> process and the HCQIA immunity provisions enumerated at 42 U.S.C. § 11112(a)". *Id.* at ¶ 100. However. the Court finds that Plaintiff fails to create a

genuine issue of material fact that any of the § 1983 Defendants are state actors and, therefore, does not reach the second element of this claim.

[23] A plaintiff bringing a civil rights claim for damages under § 1983 must demonstrate that the defendant was a person acting under color of state law. If the record does not reflect that the defendant acted under color of state law when engaged in the alleged misconduct, a claim for violation of civil rights under § 1983 must fail as a matter of jurisdiction and there is no need for the court then to determine whether a federal right has been violated. *Polk County v. Dodson*, 454 U.S. 312, 315, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

[24] State action is shown if: 1) the deprivation of federal rights was caused by the exercise of some right or privilege created by the state or by a person for whom the state is responsible; and 2) the party charged with the deprivation was a person who may fairly be said to be a state actor. *Lugar*, 457 U.S. at 937, 102 S.Ct. 2744. Under this test, liability attaches to those wrongdoers who "carry a badge of authority of a[s]tate and represent it in some capacity." *National Collegiate Athletic Ass'n. v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988).

[25] No single method of analysis determines the presence of state action in § 1983 cases. ***317** *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 98 (3d Cir.1984). Instead, the analysis depends on that facts and circumstances of each case. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Regardless of the approach used, the heart of the inquiry is to discern if the defendant exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *Groman v. Twp. of Manalapan*, 47 F.3d 628, 639 n. 17 (3d Cir.1995).

The Supreme Court has suggested at least three separate tests to determine if the actions of a private person can fairly be attributable to the state: 1) the "close nexus" test, under which the court determines whether the state can be deemed responsible for the specific conduct at issue, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); 2) the "symbiotic relationship" test, in which the court examines the relationship of the parties to determine whether or not the state has "insinuated itself into a position of interdependence" with the alleged actor, so as to be considered a joint participant therein, *Burton*, 365 U.S. at 725, 81 S.Ct. 856; and 3) the "public function" test, under which the court inquires into whether the government is using a private party to engage in activities that were the exclusive prerogative of the state. *Rendell-Baker*, 457 U.S. at 841, 102 S.Ct. 2764.

Plaintiff clearly indicates that he is not claiming the § 1983 Defendants engaged in activities that were the exclusive prerogative of the state. (Doc. No. 147, p. 25). Plaintiff does, however, claim that state action applies to the § 1983 Defendants under the symbiotic relationship and close nexus test. *Id.* at 26.

[26] A symbiotic relationship exists where a state has so far insinuated itself into a position of interdependence with the actor that it must be recognized to be a joint participant in the challenged activity which, on that account, cannot be considered so "purely private" as to fall outside the scope of the Fourteenth Amendment. *Krynicky*, 742 F.2d at 98. A tenuous connection to state action does not convert a private action into one which is under color of state law. It is well established that the interdependence between the state and the private actor must be pronounced before the law will transform the private action into state action. *Groman*, 47 F.3d at 641.

[27] The close nexus test requires that a plaintiff demonstrate that there is a sufficiently close nexus between the government and the private party. The primary issue to be examined under the nexus test is not whether the state was involved in some manner in the relevant events, but

whether there is a sufficiently close nexus between the state and the challenged action of the private party so that the action of the private party may be fairly attributable to the state. *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777; *Groman*, 47 F.3d at 638.

1. UPMC and Lee

[28] Plaintiff alleges Lee and UPMC are state actors. (Doc. No. 133, pp. 20-22, ¶¶ 98-106; Doc. No. 147, pp. 23-34). Lee and UPMC argue they are not state actors and there is insufficient evidence on the record to establish they are state actors. (Doc. No. 140, pp. 13-18). Therefore, Lee and UPMC argue, they are not liable under § 1983 and are entitled to summary judgment in their favor on this issue. *Id.*

To begin, Plaintiff attempts to argue that Lee and UPMC are entwined in a "symbiotic relationship" with the Commonwealth or are state actors under the close nexus test. (Doc. No. 133, pp. 20-22, ¶¶ 98-106; Doc. No. 147, p. 26). However, review of the evidence of record and recent Third Circuit case law reveals Plaintiff does not raise a genuine issue of material ***318** fact sufficient to survive summary judgment on this issue.

First, in *Crissman v. Dover Downs Entm't, Inc.*, 289 F.3d 231 (3d Cir.2002), the Third Circuit drastically limited the "symbiotic relationship" theory. [FN15] The Third Circuit held that the manager of the defendant's subsidiary corporation was not a state actor when he made the decision to exclude plaintiff from its facility that operated a racetrack and slot machines. *Id.* at 239. In reaching this conclusion, the Third Circuit held that it was essential to focus upon the specific conduct complained of and determine whether the state was responsible for it. *Id.* (citations omitted). The Third Circuit held there was no state action despite the following: 1) assuming that the State of Delaware had granted Dover Downs a six-month monopoly for harness racing; 2) the fact that a state Commission Rule required Dover Downs to "abide by and *enforce* the Act and the rules and orders of the Commission" (emphasis in original); 3) the fact that the state had benefitted

from a video lottery operated at Dover Downs, owned or leased the slot machines and shared the profits; and 4) the fact that Dover Downs was not permitted to fill many positions in its organization without state approval. *Crissman*, 289 F.3d at 243, 246-47; *see also* *Benn v. Universal Health Sys., Inc.*, 371 F.3d 165, 172-73 (3d Cir.2004) (holding that a mental healthcare facility did not become a state actor by acting pursuant to Pennsylvania's commitment procedures).

> FN15. The *Crissman* court expressly limited the reach of *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), the case that created the symbiotic relationship test. *Id.* at 725, 81 S.Ct. 856. Noting the *Burton* involved a privately owned and
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> racially segregated restaurant located in a public parking garage, the Third Circuit concluded that the symbiotic relationship was "crafted for the unique set of facts presented" and would not be expanded to apply beyond those facts. *Id.* at 242, 246, 81 S.Ct. 856.

In addition, *Crissman* limited the relevance of *Braden v. Univ. of Pittsburgh*, 552 F.2d 948 (3d Cir.1977) and *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir.1984), the cases that deemed the University of Pittsburgh to be a state actor under the symbiotic relationship test. 289 F.3d at 45 (recognizing that these cases were incorrect in concluding the *Burton* "remained a viable framework"). Central to the Third Circuit's decision in both *Braden* and *Krynicky* was the recognition that the Commonwealth had taken the affirmative step of statutorily accepting responsibility for the University by enacting the University of Pittsburgh-Commonwealth Act (hereinafter "University Act"), 24 P.S. § 2510-201 *et seq.* *See* *Crissman*, 289 F.3d at 245. The University Act, which clearly resulted from state action by the General Assembly and the Governor of Pennsylvania, established the "... University of Pittsburgh as an instrumentality of the Commonwealth ..."; provided

that twelve of the University's trustees be selected by the Commonwealth and that certain public officials serve as trustees ex officio; provided that the Commonwealth make annual appropriations to the University to be used as specified by the Commonwealth; authorized the Commonwealth to set up tuition and fee schedules for in-state students; and required that annual reports of all activities of the University be filed with the Governor and the General Assembly.

Similarly, the Third Circuit declined to apply *Krynicky* in *Boyle v. Governor's Veterans Outreach & Assistance Center*, 925 F.2d 71 (3d Cir.1991) and instead held that the defendant's termination of the plaintiff's employment did not constitute state action even though: 1) the Governor performed central planning, supervisory and administrative functions; 2) the defendant ***319** was required to submit audits and financial reports to the state; 3) the Commonwealth was committed to future funding of the defendant; 4) the relationship was created by statute; and 5) the defendant received free space in state office buildings. *Id.* at 76-77. In so holding, the *Boyle* court distinguished *Krynicky* by focusing on the fact that the University Act expressly made the University an instrumentality of the State and set up a system in which "the Commonwealth oversees virtually every aspect of the operation of the University." *Id.* at 76

Unlike in *Crissman*, the Plaintiff in the case *sub judice* has not presented any evidence that the Commonwealth has given Lee or UPMC any kind of state monopoly, drawn any kind of profits from Lee or UPMC activities, or limited the ability of Lee or UPMC to hire employees. (*See* Doc. No. 147). Second, the University Act does not apply to Lee or UPMC, they are separate, independent corporations. (Doc. No. 142, Exhibit H--Jegasothy Aff. ¶¶ 6, 7). Lee and UPMC also are not controlled by each other and are not under common control. *Id.* At all times relevant to the case *sub judice* neither UPMC nor Lee has shared administrators or corporate officers with the University of Pittsburgh and both entities are managed and operated independently of the University of Pittsburgh. *Id.* at ¶ 6. There is no statute declaring Lee or UPMC to be an

"instrumentality of the State," or designating it as "state-related." *Id.* at ¶ 8. Additionally, there is no statute providing for state appropriations to Lee or UPMC. *Id.* at ¶ 9. The Commonwealth does not specify how Lee or UPMC must utilize its operating funds, and UPMC and Lee are not required to file with the Commonwealth a statement setting forth the amounts and purposes of all expenditures made from its accounts. *Id.* at ¶¶ 10-12. Furthermore, the Commonwealth does not set statutory fees for patients in UPMC facilities and neither Lee nor UPMC is statutorily required to submit annual reports of their activities to the Commonwealth. *Id.* at ¶¶ 13, 14.

Second, Plaintiff alleges that Lee and UPMC are "an integral component of the University of Pittsburgh, a state related university, of and through which UPMC is marketed alternatively as a state owned, sponsored and/or intimately affiliated entity which is linked to the University of Pittsburgh website." (Doc. No. 133, pp. 2-3, ¶¶ 5, 6). Plaintiff provides no evidence in support of these allegations.

On the other hand, UPMC and Lee provide evidence establishing that Lee and UPMC are distinct and separate entities from the University of Pittsburgh. (Doc. No. 142, Exhibit H--Jegasothy Aff. ¶ 6). UPMC and Lee point out that the University of Pittsburgh is not a defendant in the case *sub judice* and argue that Plaintiff has failed to set forth evidence that creates a genuine issue of material fact on the issue of there being a connection between UPMC or Lee and any state actor or state entity of a nature sufficient to cause their conduct to come within the definition of state action. (Doc. No. 142, pp. 13-18).

In *Steppling v. Presbyterian Univ. Hosp.*, Civil Action No. 94-401 (W.D.Pa. Nov. 14, 1995)(Ambrose, J.) the court faced the issue of whether Presbyterian University Hospital ("PUH"), UPMC's predecessor, was a state actor under § 1983 by virtue of its relationship with the University of Pittsburgh. The plaintiff relied on the fact that the University and PUH were parties to a master services agreement, whereby the University provided certain executive management services to PUH and that the specific deci-

sion or action being challenged was made by an employee of the University. *Id.* at 6-8. The plaintiff argued that PUH was a state actor under both the symbiotic relationship ***320** and close nexus tests. *Id.* at 13. Rejecting the plaintiff's arguments, the court noted that there was insufficient evidence of a direct connection between the Commonwealth of Pennsylvania and PUH. *Id.* at 15. The court went on to explain that PUH's relationship to the University, a state actor, also failed to tie PUH to the Commonwealth in a way that permitted a finding of state action:

"[T]he relationship between the Commonwealth of Pennsylvania and the University of Pittsburgh, which qualifies the University of Pittsburgh as a state actor for purposes of 42 U.S.C. § 1983, is of a completely different nature than that of the University of Pittsburgh and PUH." *Id.* at 15. "... [N]o court appears to be willing to extend the applicability of § 1983 claims to cover situations where the symbiotic relationship is not between a private entity and a state but between a private entity that has been deemed a state actor for purposes of 42 U.S.C. § 1983 because of its relationship to a state and another private entity." *Id.* at 16.

As discussed earlier, Plaintiff has failed to provide evidence of a direct connection between the Commonwealth and Lee or UPMC of a level sufficient to render their actions state action. Furthermore, in accordance with the *Steppling* decision, the Court finds that the relationship between Lee and UPMC, private entities, and the University of Pittsburgh, a private entity that has been deemed a state actor, is of a completely different nature than the relationship between the Commonwealth, the state itself, and the University of Pittsburgh. This Court, like other courts, is not willing to extend the applicability of § 1983 claims to cover situations where the symbiotic relationship, if one even exists, is not between a private entity and a state actor but between a private entity that has been deemed a state actor by virtue of its relationship to a state and another private entity. The Court finds that Plaintiff has failed to provide evidence that creates a genuine issue of material fact regarding the issue of

whether Lee and UPMC are state actors under the symbiotic relationship test or the close nexus test based on their relationship to the University of Pittsburgh.

Third, Plaintiff argues that a "nexus" between the University of Pittsburgh and Lee exists because the June 23, 2003 revocation of Plaintiff's clinical privileges was a joint action of Lee and the University of Pittsburgh. (Doc. No. 147, p. 33). This argument is based on his perception that the University of Pittsburgh ratified the revocation by placing its "seal" on the revocation letter and other correspondence related to the revocation of Plaintiff's clinical privileges. (Doc. No. 147, p. 33). Review of the revocation letter shows that what Plaintiff is referring to as the "seal" is, in fact, a reproduction of the emblem of the University of Pittsburgh that is located in the upper right hand corner of Lee's letterhead that indicates Lee is a hospital of the UPMC Health System. (Doc. No. 147, Ex. 15). This emblem that is incorporated into the letterhead is in no way a "seal" used by the University of Pittsburgh to ratify an action. There is absolutely no "seal" on the revocation letter demonstrating the University of Pittsburgh signed off on the revocation of Plaintiff's clinical privileges or was in any way involved in the proceedings. The Plaintiff's attempt at a play on the use of the word "seal" does not create a fact issue with regard to whether UPMC and Lee are state actors under the close nexus test. Therefore, the Court finds Plaintiff fails to raise a genuine issue of material fact regarding whether the UPMC and Lee were acting under color of state law with this argument.

**321* [29] Finally, Plaintiff argues that Judge Leahey is a state actor and when he entered an Order in Untracht I, lifting the preliminary injunction put in place at Plaintiff's request that prevented the Defendants from making a report to the National Practitioners Data Bank (hereinafter "Data Bank"), these Defendants became state actors due to the relationship between the Judge and the litigant. (Document No. 147, pp. 28-33). Plaintiff argues that the Defendants improperly involved Judge Leahey before reporting Plaintiff to the Data Bank because they had an independent statutory duty to report Plaintiff to the Data

Bank. *Id.* at 28. This argument entirely ignores the facts at hand and the controlling case law.

First, Plaintiff is the one who involved the state when he filed three separate lawsuits in the Cambria County Court of Common Pleas. (Doc. No. 142, Exs. A, B, C; Doc. No. 136, pp. 3-5). Defendants do not become state actors by virtue of being involved in a lawsuit filed by Plaintiff. *Tunstall v. Office of Judicial Support of the Court of Common Pleas of Delaware County*, 820 F.2d 631, 634 (3d Cir.1987). Furthermore, Defendants' involvement in the lawsuits filed by Plaintiff does not create joint action with the state on the Defendants' part. *Id.* Although Defendants had a duty to report to the Data Bank, they were prevented from doing so pursuant to a preliminary injunction obtained by Plaintiff. (Doc. No. 142, Ex. D). Defendants sought to have this injunction terminated and a hearing was scheduled. (Doc. No. 147, pp. 28-29). Plaintiff was on notice of the hearing, but elected voluntarily to leave the country. (Doc. No. 147, p. 30). Plaintiff now goes so far as to allege that the Court's holding of the scheduled hearing, of which he was on notice, in his voluntary absence was an *ex parte* communication with the Judge that creates a joint action between the Defendants and the state acting through Judge Leahey. (Doc. No. 147, pp. 30, 32).

In short, the action of lawfully seeking the revocation of a preliminary injunction put in place at the Plaintiff's request in order to comply with their statutory duty of reporting to the Data Bank in no way makes the Defendants state actors subject to liability under § 1983. *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) ("[o]f course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a [ ] joint actor with the judge"). Additionally, the fact that Plaintiff chose to voluntarily leave the country prior to the time of the hearing that he knew was scheduled in a case he filed is neither the Judge's nor the Defendants' fault or problem. The Court finds Plaintiff establishes no genuine issue of material fact with these allegations and presents no evidence connected to these allegation which raise any genuine issue of material fact

regarding whether UPMC and Lee or any of the other § 1983 Defendants are state actors.

In light of the evidence on the record, the Court finds that Plaintiff has failed to provide evidence that creates a genuine issue of material fact regarding the issue of whether Lee and UPMC are state actors under the symbiotic relationship or close nexus test, and finds that the Defendants are entitled to judgment as a matter of law. Accordingly, summary judgment is granted in favor of the UPMC and Lee on Plaintiff's § 1983 claim.

2. Conemaugh

Similar to the argument Plaintiff makes regarding the UPMC Defendants and the University of Pittsburgh, Plaintiff alleges that Conemaugh heavily advertises its affiliation with Temple University (hereinafter referred to as "Temple") to benefit financially, attract patients and resident ***322*** physicians, and that this affiliation makes Conemaugh a state actor under either the symbiotic relationship or close nexus test. (Doc. No. 133, p. 4, ¶ 10; Doc. No. 147, p. 26). Conemaugh alleges its affiliation with Temple does not make it a state actor. (Doc. No. 140, pp. 15-18). It is important to note that Plaintiff does not attempt to allege a direct relationship between the Commonwealth and Conemaugh. Rather, Plaintiff's argument is essentially that Conemaugh's affiliation with Temple, which has been held to be a state actor in some circumstances through its relationship to the Commonwealth, extends down another level and makes Conemaugh a state actor because it affiliates with Temple for certain things. (Doc. No. 133, pp. 20-22, ¶¶ 98-106).

[30] Plaintiff attempts a bootstrap theory based on an alleged "affiliation" between Conemaugh and another alleged state actor, Temple, to argue that Conemaugh is thereby a state actor. (Doc. No. 133, pp. 20-22, ¶¶ 98-106). Although Temple has been held to be a state actor, based on its participation in the Commonwealth System of Higher Education, *Krynicky*, 742 F.2d at 99, [FN16] Conemaugh's contractual relationship with Temple does not make it a state actor for purposes of § 1983. *Steppling*,

CA. No. 94-401, 15-16 (W.D.Pa.1995) ("to date no court appears willing to extend the applicability of § 1983 claims to cover situations where the symbiotic relationship is not between a private entity and the state but between a private entity that has been deemed to be a state actor ... and another private entity[ ]"). The *Krynicky* court pointed out that the mere existence of a contractual relationship between a government entity and a private entity does not convert the private entity into a state actor for § 1983 purposes. *Id.* at 99-100 (citing *Rendell-Baker*, 457 U.S. at 841, 102 S.Ct. 2764); *see also Crissman*, 289 F.3d 231 (3d Cir.2002). Furthermore, existence of a contractual relationship between two private entities, one of which is a state actor is insufficient to make the second private entity a state actor for purposes of § 1983. *Steppling*, CA. No. 94-401, pp. 15-16.

> FN16. *But see Commonwealth v. Downing*, 511 Pa. 28, 511 A.2d 792, 794-95 (1986) (holding that Temple is a private institution despite its designation as part of the Commonwealth system of higher education); *Carroll v. Temple University*, 1994 WL 590615 (E.D.Pa.1994) (holding Temple's status as a federal depositary library does not transform it into a public institution).

Plaintiff offers no evidence to support the conclusion that the specific conduct at issue, revocation of his staff privileges, could be fairly attributed to the state. *See Crissman*, 289 F.3d at 239 (holding the state must be responsible for the specific conduct at issue in order for the action to be fairly attributable to the state). Plaintiff provides no evidence to describe the nature of the "affiliation" between Conemaugh and Temple. (*See* Doc. No. 147). Plaintiff also does not provide any evidence that Temple owns or manages the hospital or that it had any involvement at all in the events leading up to the revocation of Plaintiff's staff privileges. (*See* Doc. No. 147). The decision to revoke Plaintiff's staff privileges was ultimately made by Conemaugh's Board of Directors. (Doc. No. 152, p. 7). There is neither an allegation, nor evidence

of record, suggesting that Temple so controlled the Conemaugh Board that its actions were really actions of Temple University and, by extension, the State. (Doc. No. 152, p. 7).

In contrast, the evidence on the record before the Court shows that the Affiliation Agreement between Temple and Conemaugh does not create a relationship of such a level that it would transform Conemaugh's**323* internal staffing decisions into actions that could in any way, let alone fairly, be attributable to Temple. Plaintiff's [sole basis] for claiming that Conemaugh should be considered a state actor is the fact that some of the individuals involved in the revocation of his staff privileges also held faculty appointments at Temple. (Doc. No. 137, Ex. B, Pl.Depo., pp. 117-124). As indicated in the affidavit of Steven Tucker, President of Conemaugh, Temple and Conemaugh entered into the Affiliation Agreement in July 1977 so that Temple students in the health professions could obtain practical experience working under the direction of Conemaugh's medical staff. (Doc. No. 137, Ex. A, Steven Tucker Aff., ¶ 3). The "affiliation" between Temple and Conemaugh is limited to offering mutual support for their respective educational and health services missions. (Doc. No. 137, Ex. A, Steven Tucker Aff., ¶ 4). The Affiliation Agreement specifically provides that Conemaugh retains complete control over its operations, the quality of patient care and appointments to the Conemaugh medical staff. (Document No. 137, Ex. A, Steven Tucker Aff., ¶ ¶ 4,5; Ex. A to Ex. B--Affl. Agmt. ¶ 1). Temple, on the other hand, retains ultimate responsibility for Temple's educational activities and faculty appointments. (Doc. No. 140, Ex. A to Ex. B--Affl. Agmt. ¶ 2). Furthermore, the Affiliation Agreement also provides that neither party delegates to the other authority for making staff or faculty appointments to the other party. (Doc. No. 140, Ex. A to Ex. B--Affl. Agmt. ¶ 4). Finally, the Affiliation Agreement makes no provision for payment from Temple to Conemaugh and Conemaugh does not receive payment of any kind from Temple. (Doc. No. 140, Ex. A--Steven Tucker Aff. ¶ 6).

The Court finds that the evidence of record establishes that Conemaugh and Temple are totally independent with regard to their respective staff and faculty appointments. The Court finds no evidence in the record to establish anything to the contrary occurred with respect to the revocation of Plaintiff's staff privileges at Conemaugh. Additionally, the Court finds that the evidence on the record establishes that Temple had no right to control Conemaugh and Plaintiff provided no evidence establishing that Temple participated in the actions that resulted in the revocation of Plaintiff's staff privileges. [FN17] Since Conemaugh's actions in revoking Plaintiff's staff privileges are not attributable to Temple they cannot, therefore, be attributable to the state for purposes of § 1983. Accordingly, the Court finds that Plaintiff has failed to present sufficient evidence to raise a genuine issue of material fact regarding whether Conemaugh was a state actor and finds that Defendants are entitled to judgment as a matter of law; therefore, as a result, summary judgment is granted in favor of Conemaugh on Plaintiff's § 1983 claim.

> FN17. Although there were doctors on staff at Conemaugh that were clinical professors at Temple, Plaintiff provides no evidence showing that their actions related to the peer review at Conemaugh were undertaken in their capacities as clinical professors at Temple rather than in their capacities as doctors on staff at Conemaugh. (*See* Doc. No. 147).

3. Individual Doctor § 1983 Defendants

Plaintiff's only two allegations against the individual doctor defendants he sues under § 1983, listed as Dr. Kolff, Dr. Saluzzo, Dr. Duke, Dr. Ergas, Dr. Fikri, Dr. Fiorica, Dr. Benz, Dr. Slater, Dr. Carney and Ms. Weisbrodt (hereinafter the "Individual Doctor Defendants") are that "... Ergas, Fiorica, Benz, Slater, Carney and Weisbrodt, individually made materially false statements under oath to adversely influence Defendant Lee's fair hearing regarding Plaintiff[,]" (Doc. No. 133, p. 22, ***324** ¶

104), and that Dr. Benz's testimony regarding his recommendations after observing Plaintiff are equal to the University of Pittsburgh placing its seal of approval on Lee's decision because Dr. Benz is on the University of Pittsburgh teaching staff. (Doc. No. 147, p. 34). The Court interprets these allegations by Plaintiff to be an attempt to assert that the state was acting through the Individual Doctor Defendants because they are members of either the medical staffs at the University of Pittsburgh or Temple. Furthermore, the Court notes that despite naming Kolff, Saluzzo and Duke, Plaintiff makes no specific allegations against them.

[31] The Court construes Plaintiff's claim to be that the Individual Doctor Defendants from Conemaugh should be considered state actors because some of these individuals involved in the revocation of his staff privileges also held faculty appointments at Temple. (Document No. 140, Ex. B, Pl. Depo., pp. 117- 124). As discussed above, Temple and Conemaugh retain complete control over their appointments to faculty and medical staff respectively. (Doc. No. 140, Ex. A--Steven Tucker Aff., ¶¶ 4, 5). Additionally, the Court understands Plaintiff to be claiming that named Individual Doctor Defendants from Lee were state actors because they held positions as clinical professors at the University of Pittsburgh. (Doc. No. 133, p. 22, ¶ 104; Doc. No. 147, p. 34). With these assertions, Plaintiff is again attempting to argue that the affiliation between Lee and the University of Pittsburgh and the affiliation between Conemaugh and Temple creates state action on behalf of Lee, Conemaugh, and, in this instance, the Individual Doctor Defendants, because the University of Pittsburgh and Temple have in some circumstances been held to be state actors by virtue of their relationship with the Commonwealth. The relationship between the Commonwealth and Lee, Conemaugh, or the Individual Doctor Defendants existing because of affiliations with the University of Pittsburgh or Temple is far too attenuated to hold state action on the part of Lee, Conemaugh or the individual Defendants. *See Steppling,* CA. No 94-401, 15-16 (W.D.Pa.1995) ("to date no court appears willing to extend the applicability of § 1983 claims to cover situations where the symbiotic relationship is not between a

private entity and the state but between a private entity that has been deemed to be a state actor ... and another private entity[ ]").

[32] Furthermore, regardless of whether the Individual Doctor Defendants against whom Plaintiff claims violations of § 1983 are clinical professors at either Temple or University of Pittsburgh, there is no evidence showing that any of them utilized power possessed by virtue of state law or their positions as clinical professors at either the University of Pittsburgh of Pittsburgh or Temple when they recommended and/or participated in peer review actions against Plaintiff as members of the medical staffs at their respective hospitals. (*See* Doc. No. 147). These actions had nothing to do with the University of Pittsburgh, Temple or the Individual Doctor Defendants' positions as clinical professors at either university. The evidence shows that the peer review actions were undertaken in response to specific incidents that occurred at each respective hospital. (Doc. No. 155, Ex. A; Doc. No. 147, Ex. 1, Pl. Aff. ¶ 25). Plaintiff presents no evidence showing that the actions were undertaken at the behest of either university or in furtherance of the Individual Doctor Defendants positions as clinical professors at either university. (*See* Doc. No. 147). Plaintiff's allegations that these Individual Doctor Defendants hold positions as clinical professors at either university simply is not sufficient evidence to create an issue of material fact on whether they were state ***325** actors. Plaintiff fails to meet his burden on the second element in a § 1983 claim, that there be state action with regard to the Individual Doctor Defendants. Accordingly, summary judgment in favor of the § 1983 Individual Doctor Defendants on Plaintiff's § 1983 claim is granted.

C. § 1981 CLAIM

Plaintiff makes a claim under 42 U.S.C. § 1981 for the first time in his Second Amended Complaint. (Doc. No. 133, pp. 23-24, ¶¶ 107-113). Plaintiff asserts that revocation of his staff privileges: 1) constituted a "retaliatory constructive discharge" from the Defendants' medical staffs because of his "whistleblower activities;" and 2) that

he was the victim of "reverse national origin discrimination" based on his status as an "American born and educated surgeon." (Doc. No. 133, p. 23, ¶¶ 109-111). Defendants argue in their respective motions that: 1) § 1981 protects against racial and ethnic discrimination in the workplace and does not address retaliation claims based on "whistleblower" activities of the type alleged by Plaintiff; and 2) Plaintiff does not establish a *prima facie* case of "reverse discrimination" because he fails to create a genuine issue of material fact on the issue of whether he was treated less favorably than other similarly situated individuals. (Doc. No. 137, pp. 38-40; Doc. No. 140, pp. 18-21).

[33][34] The elements of a *prima facie* case under § 1981 are the same as those under Title VII. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n. 1, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). A plaintiff carries the initial burden to establish a *prima facie* case for retaliation, and to meet that burden he must show: 1) he engaged in activity protected under the statute; 2) he suffered adverse action by the employer either after or contemporaneous with his engagement in the protected activity; and 3) a causal connection between his protected activity and the employer's adverse action. *Slagle v. County of Clarion*, 435 F.3d 262, 265 (3d Cir.2006) (citation omitted); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir.1997); *see also Schatzman v. Martin Newark Dealership, Inc.*, 158 F.Supp.2d 392, 400 (D.Del.2001) (holding that to prevail on a § 1981 claim a plaintiff must prove he engaged in a protected activity); *Tucker v. Merck & Co., Inc.*, 2004 WL 350467 *3 (holding protected activity under § 1981 is activity related to making a claim of racial discrimination and activities not related to making claims of racial discrimination are not protected under § 1981); *Dean v. Kraft Foods North America*, 2005 WL 1793532 *9 (E.D.Pa.2005) (holding § 1981 protects employees from retaliation for opposition to racial discrimination). A plaintiff also carries the initial burden to establish a *prima facie* case for reverse *racial* discrimination in that he must show that the employer is treating similarly situated people less favorably than others because of their race; however, a claim for *national origin* discrimination

is not a viable claim under § 1981. *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3d Cir.1999); 42 U.S.C. § 1981.

The *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) burden-shifting analysis applies to claims of retaliation and reverse discrimination. *Krouse*, 126 F.3d at 500 (retaliation); *Iadimarco*, 190 F.3d at 163 (reverse discrimination). Under this analysis, the plaintiff must first establish a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 804-05, 93 S.Ct. 1817. If the plaintiff is successful in doing so, the burden then shifts to the defendant to set forth a legitimate, non-discriminatory reason for the discharge. *Id.* The burden on the defendant is "relatively light." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir.1994). If the defendant sets forth such ***326** a reason, the burden shifts back to the plaintiff who must then show that the reason asserted by the defendant is a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804-05, 93 S.Ct. 1817. The plaintiff's burden at this stage is a heavy one. *Kautz v. Met-Pro. Inc.*, 412 F.3d 463, 467 (3d Cir.2005). In order to show the proffered reason was, in fact, pretext, the plaintiff must point to "*some* evidence, direct or circumstantial, from which a fact finder could reasonably either: 1) disbelieve the employer's articulated reasons; or 2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Fuentes*, 32 F.3d at 764. Thus, to survive a motion for summary judgment the plaintiff "must make a *prima facie* showing of discrimination and point to 'evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.' " *Hugh v. Butler County Family YMCA*, 418 F.3d 265, 268 (3d Cir.2005) (quoting *Sorba v. Penn. Drilling Co.*, 821 F.2d 200, 205 (3d Cir.1987)).

[35] Plaintiff fails to establish a *prima facie* case of retaliation. First, with respect to his retaliation claim, Plaintiff fails to set forth any evidence that he engaged in conduct protected by § 1981. (*See* Doc. No. 147). Plaintiff's only allegation of protected conduct is that he engaged in what he terms "whistleblower activities." (Doc. No. 133, p. 23, ¶ 111). Whistleblower activities, however, are not

protected under § 1981, rather a claim for retaliation for such conduct must be brought under the appropriate whistleblower statute. *See, e.g.,* 43 P.S. § [1422], *et seq.* Section 1981 covers retaliation for engaging in the protected activity of reporting discrimination. 42 U.S.C. § 1981. [FN18] Plaintiff's failure to provide evidence that he engaged in any activity protected under § 1981 results in his inability to make out a *prima facie* case of retaliation. Accordingly, the Court finds no genuine issue of material fact exists regarding Plaintiff's § 1981 claim for retaliation and the Defendants are entitled to judgment as a matter of law, therefore, the Defendants shall be granted summary judgment on this claim.

> FN18. Although Plaintiff made a claim under a state whistleblower statute in his Second Amended Complaint, the Court does not have jurisdiction over this claim as discussed later in this Memorandum Opinion and Order. (Doc. No. 133).

Second, Plaintiff claims reverse *national origin* discrimination in violation of § 1981. (Doc. No. 133, p. 23, ¶ 111). Section 1981, however, does not recognize claims for national origin discrimination. 42 U.S.C. § 1981. Therefore, Plaintiff's assertion of reverse national origin discrimination under § 1981 fails to state a claim upon which relief can be granted. [FN19]

> FN19. Furthermore, even assuming Plaintiff had asserted reverse discrimination based on his race rather than his national origin, Plaintiff fails to set forth any evidence establishing that any similarly situated doctors were treated differently than himself. (*See* Doc. Nos. 133, 146 and 147). This is required in order to set forth a *prima facie* case of reverse discrimination. Plaintiff's failure to set forth such evidence would result in no genuine issue of material fact existing on a claim for reverse discrimination and, therefore, summary judgment in favor of the Defendants would be proper. *Iadimarco*, 190 F.3d

at 163.

D. 42 U.S.C. § 11112

Plaintiff attempts to create a cause of action for himself under 42 U.S.C. § 11112 by asserting that this statute sets out a "per se standard" of "professional peer review." Plaintiff alleges Lee and Conemaugh breached this per se duty and "the applicable Medical Staff By-laws" in a variety of ways. (Doc. No. 133, pp. 30-33). Defendants argue that this provision does ***327** not create a cause of action, but instead pertains to whether or not a defendant will be permitted to utilize the immunity provision of § 11111. (Doc. No. 137, pp. 55-56; Doc. No. 140, pp. 43-44). The Court agrees with Defendants' position.

[36][37] The purpose of 42 U.S.C. § 11111, the immunity provision of the Health Care Quality Improvement Act (hereinafter "HCQIA"), is to grant immunity from monetary damages to those persons participating in professional peer review activities in order "... to deter antitrust suits by disciplined physicians." *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 201 (3d Cir.2005). The next section, § 11112, establishes guidelines that, if followed, will assure that those involved in the peer review process in question will be entitled to immunity. 42 U.S.C. § 11112. The statute provides a "safe harbor" for those that follow its guidance. *Id.; see also Wieters v. Roper Hosp., Inc.*, 58 Fed.Appx. 40, 45-46 (4th Cir.2003)(holding hospital procedure that was fair to physician under the circumstances satisfied the requirements for immunity from damage lawsuits under the HCQIA, even though it did not strictly adhere to the hospital bylaws or safe harbor provisions of the HCQIA). This section can be used by a plaintiff to argue that a defendant who claims immunity under the HCQIA is not, in fact, entitled to such immunity due to failures to comport with the standards set forth in § 11112. *See Mathews*, 87 F.3d 624, 634-38 (analyzing whether defendants complied with the requirements of the statute to determine whether they were entitled to immunity). What § 11112 does not do, how-

ever, is create the basis of a cause of action for a physician who has been subject to a peer review process, such as Plaintiff, to claim that failure to use the standards set out in the section entitles him to some type of recovery. 42 U.S.C. §§ 11111, 11112. Therefore, Plaintiff fails to, and cannot, state a claim upon which relief can be granted under 42 U.S.C. § 11112.

E. CLAIMS BROUGHT UNDER SUPPLEMENTAL JURISDICTION

Pursuant to 28 U.S.C. § 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy...." However, 28 U.S.C. § 1367(c) provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ... (3) the district court has dismissed all claims over which it has original jurisdiction...."

The Third Circuit has recognized that, "where the claim over which the district court has original jurisdiction is dismissed before trial, the court must decline to decide the [supplemental] state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir.2000) (quoting *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir.1995)).

The Court finds that judicial economy, convenience, and fairness to the parties in the case *sub judice* do not provide an affirmative justification for deciding the Plaintiff's supplemental state claims. Plaintiff has brought numerous state court lawsuits centered on the issues presented in this case and according to Plaintiff, the claims he filed in his latest state court action Untracht III, are all contained in the case *sub judice* and are so related to claims in this action that they form part of the same case or controversy under 28 U.S.C. § 1367. (Doc. No. 146, pp. 3-4). ***328** Therefore, the Court finds that Plaintiff currently

has a case pending before the state court which raises issues based on the same set of facts and which is a more appropriate forum for Plaintiff's state claims. As a result, the Court, in its discretion, declines to exercise supplemental jurisdiction over Plaintiff's state claims. Accordingly, Plaintiff's state claims of intentional infliction of emotional distress, tortious interference with existing and prospective contractual relationships, defamation per se (libel and slander), breach of contract violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, Civil Conspiracy, violation of Pennsylvania MCARE and whistleblower laws are dismissed.

[38][39] Finally, Plaintiff argues that the Court must assert supplemental jurisdiction over the claims he currently has pending in his state court action, Untracht III, because, as discussed above, according to Plaintiff the claims are so related to claims in this action that they form part of the same case or controversy under 28 U.S.C. § 1367. (Doc. No. 146, pp. 3-4). Although a district court assumes supplemental jurisdiction over some claims, a district court does not assume supplemental jurisdiction over claims that a plaintiff chooses to bring in state court separately from the claims he brings in federal court. *See* 28 U.S.C. § 1367. What Plaintiff is in essence asking the Court to do is to allow him to remove an action he filed in state court. Removal by a plaintiff is not permitted because the plaintiff had the original choice of forum. 28 U.S.C. § 1446; *American Intern. Underwriters (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1260 (9th Cir.1988); *see also Share v. Sears, Roebuck & Co.*, 550 F.Supp. 1107, 1109 (E.D.Pa.1982) (holding only defendants, not third party defendants or plaintiffs, can remove an action); *Resident Advisory Bd. v. Tate*, 329 F.Supp. 427, 432 (E.D.Pa.1971) (holding if the plaintiff chooses state court as his forum he cannot complain he will be injured if the case remain in state court). Only defendants may remove an action. *Id.* Thus, the Court finds Plaintiff may not remove his state court action. In addition, the Court granted summary judgment on all of Plaintiff's federal claims and dismissed his state claims under 28 U.S.C. § 1367(c). For these reasons, Plaintiff's request

that the Court assert supplemental jurisdiction over the claims he brought in his state court action is denied.

F. DEFENDANTS LEE REGIONAL HEALTH SYSTEMS, INC. and LEE REGIONAL HEALTH SYSTEM FOUNDATION, INC.

Defendants Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. were added by Plaintiff in his Second Amended Complaint. (Doc. No. 133, p. 3). Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. filed a Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. No. 161) and a Brief in Support (Document No. 162). Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. argue no claims were made against them. (Doc. No. 161, p. 4). Plaintiff claims he intended to include them in the allegations he made against the "Collective Lee Defendants," however, he does not include them in his definition of the "Collective Lee Defendants" in his Complaint. (Doc. No. 163, p. 3; Doc. No. 133, p. 5, ¶ 23). Furthermore, Plaintiff claims he intended to sue them anywhere he used the term "All Defendants." (Doc. No. 163). Plaintiff, however, makes no specific allegations against Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. in his Complaint. (*See* Doc. No. 133). Therefore, the Court finds Plaintiff fails to state a claim upon which relief can be ***329** granted against Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. [FN20] Accordingly, Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc.'s Motion to Dismiss is granted with prejudice because Plaintiff has filed a Complaint, an Amended Complaint and a Second Amended Complaint but Plaintiff has failed to state claims upon which relief can be granted; therefore, these two Defendants are entitled to summary judgment or dismissal of all his claims and, further, the Court finds that permitting a third amended complaint would not result in Plaintiff being able to state any viable claims.

FN20. To the extent Plaintiff might have made any claims against Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc., these two Defendants incorporated the arguments made in Doc. Nos. 136, 137, 138, 139, 140, 141, 142, 151, 154 and 155 into their Motion to Dismiss, therefore, those claims, if any, are dismissed for the same reasons set forth in this Memorandum Opinion and Order.

IV. CONCLUSION

In conclusion, summary judgment in favor of all of the Defendants is granted on Plaintiff's Sherman Act § 1 claim, Sherman Act § 2 claim, 42 U.S.C. § 1983 claim and 42 U.S.C. § 1981 claim for retaliation. Plaintiff's claim under 42 U.S.C. § 11112 is dismissed with prejudice. Plaintiff's claim for reverse national origin discrimination under 42 U.S.C. § 1981 is also dismissed with prejudice. All of Plaintiff's remaining claims, over which this Court had supplemental jurisdiction, are dismissed because the Court, having dismissed the claims over which it had original jurisdiction, must decline to exercise its supplemental jurisdiction because judicial economy, convenience and fairness to the parties do not provide an affirmative justification for deciding these claims. Therefore, the Lee Defendants' and the Conemaugh Defendants' Motions to Dismiss or, in the alternative, for Summary Judgment (Doc. Nos. 136, 139) are granted and Plaintiff's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's Assumption of Supplemental Jurisdiction (Doc. No. 146) is denied. Additionally, Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc.'s Motion to Dismiss (Doc. No. 161) is granted with prejudice.

Finally, the Court finds that the Conemaugh Defendants' Motion to Amend the Caption (Doc. No. 138) is rendered moot.

An appropriate order follows.

ORDER

AND NOW, this 29th day of August, 2006 after considering the following motions: Motion to Dismiss Plaintiff's Second Amended Complaint by Erden Fikri, Dinesh Mathur, Vincent Fiorica, Terry Wahl, David R. Davis, Sanders Ergas, P. James Ridella, Bhaskaran Murali, Will H. Farthing, Brian Gunnlaugson, Richard Cartwright, Denise Weisbrodt, William M. Carney, Harvey Slater, George H. Benz, Jr., Stewart M. Flam, R. Joseph Federowicz, Dickey McCamey & Chilcote, P.C., UPMC Health System and UPMC Lee Regional (hereinafter sometimes referred to as "Lee Defendants") (Document No. 136), their Brief in Support (Document No. 137) and their Revised Exhibits in Support (Document No. 142); Motion to Amend the Caption by Richard Saluzzo, Jacob Kolff, Bruce Duke, Narendra Pai, William Fritz, Paul Weygandt, William M. Carney, Robert D. Fry, Conemaugh Health System and Memorial Medical Center (hereinafter sometimes referred to as "Conemaugh Defendants") (Document No. 138); Motion to Dismiss, or, in the Alternative, for Summary Judgment with Respect to Plaintiff's Second Amended Complaint by Conemaugh ***330** Defendants (Document No. 139), their Brief in Support (Document No. 140) and their Appendix to their Brief in Support (Document No. 141); Plaintiff's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's Assumption of Supplemental Jurisdiction (Document No. 146) and his Brief in Support (Document No. 147); Conemaugh Defendants' Response to Plaintiff's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's Assumption of Supplemental Jurisdiction (Document No. 151) and their Brief in Support (Document No. 152); Lee Defendants' Response To Plaintiff's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's Assumption of Supplemental Jurisdiction (Document No. 154) and their Brief in Support (Document No. 155); and Motion to Dismiss Plaintiff's Second Amended Complaint by Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc. (Document No. 161) and their Brief in Support (Document No. 162); and Plaintiff's Brief in Opposition to Lee Regional Health Systems, Inc. and Lee Regional Health

System Foundation, Inc.'s Motion to Dismiss (Document No. 163), IT IS HEREBY ORDERED that summary judgment in favor of all of the Defendants is GRANTED on Plaintiff's Sherman Act § 1 claim, Sherman Act § 2 claim, 42 U.S.C. § 1983 claim and 42 U.S.C. § 1981 claim for retaliation.

IT IS FURTHER ORDERED that Plaintiff's claim under 42 U.S.C. § 11112 is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Plaintiff's claim for reverse national origin discrimination under 42 U.S.C. § 1981 is also DISMISSED with prejudice.

IT IS FURTHER ORDERED that all of Plaintiff's remaining claims, over which this Court had supplemental jurisdiction, are dismissed because the Court, having dismissed the claims over which it had original jurisdiction, must decline to exercise its supplemental jurisdiction because judicial economy, convenience and fairness to the parties do not provide an affirmative justification for deciding these claims.

IT IS FURTHER ORDERED that the Lee Defendants' and the Conemaugh Defendants' Motions to Dismiss or, in the alternative, for Summary Judgment (Document Nos. 136, 139) are GRANTED and Plaintiff's Cross Motion for Summary Judgment, Injunctive Relief and for the Court's Assumption of Supplemental Jurisdiction (Document No. 146) is DENIED. IT IS FURTHER ORDERED that Lee Regional Health Systems, Inc. and Lee Regional Health System Foundation, Inc.'s Motion to Dismiss (Document No. 161) is GRANTED with prejudice.

IT IS FURTHER ORDERED that the Conemaugh Defendants' Motion to Amend the Caption (Doc. No. 138) is rendered MOOT.

Motions, Pleadings and Filings

• 2005 WL 3721112 (Trial Motion, Memorandum and Affidavit) Reply Brief in Support of Motion to Dismiss Plaintiff's Second Amended Complaint (Sep. 1, 2005)

• 2005 WL 4693916 (Trial Motion, Memorandum and Affidavit) Brief in Opposition to Plaintiff's Cross Motion for Summary Judgment (Sep. 1, 2005)

• 2005 WL 3721111 (Trial Motion, Memorandum and Affidavit) Reply Brief in Support of Motion to Dismiss Second Amended Complaint (Aug. 31, 2005)

• 2005 WL 4693914 (Trial Motion, Memorandum and Affidavit) Plaintiff's Brief in Opposition to Defendants' Individual Motions to Dismiss Plaintiff's Second Amended Complaint or Alternatively for Summary Judgment on Behalf of Conemaugh Defendants; Brief in Support of Plaintiff's Cross-Motion for Summary Judgment (Jul. 18, 2005)

UNTRACHT V. FIKRI, 368 F.SUPP.2D 409, W.D.PA., APRIL 6, 2005

United States District Court,

W.D. Pennsylvania.

Steven H. **UNTRACHT,** M.D., Ph.D, F.A.C.S., Plaintiff,

v.

Erden **FIKRI,** M.D., Dinesh Mathur, M.D., Vincent Fiorica, M.D., Terry Wahl, M.D., David R. Davis, Sanders Ergas, M.D., P. James Ridella, M.D., BhaskaranMurali, M.D., Will H. Farthing, M.D., Brian Gunnlaugson, M.D., RichardCartwright, M.D., Denise Weisbrodt, R.N., Richard Saluzzo, M.D., Jacob Kolff, M.D., Bruce Duke, M.D., Narendra Pai, M.D., William Fritz, M.D., Paul Weygandt, M.D., Nicholas Jacobs, James Church, M.D., Robert D. Fry, M.D., Larry Kaiser, M.D., William M. Carney, M.D., Harvey Slater, M.D., George H. Benz, Jr., M.D., the University of Pennsylvania, the Cleveland Clinic Foundation, Stewart M. Flam, R. Joseph Federowicz, Dickey McCamey & Chilcote (A Professional Corporation), Associated Anesthesiologists of Johnstown, UPMC Health System, Inc., UPMC Lee Regional Hospital, Conemaugh Health System, Memorial Medical Center, Windber Medical Center, John Does 1-20, Defendants.

No. CIV.A. 3: 3-199J.

April 6, 2005.

Background: Physician brought action, asserting violations of federal antitrust laws, and a civil rights violation, and tort claims against thirty-six defendants, including individual physicians and health care professionals, a university, a law firm, an anesthesiology group, two health systems and four medical facilities. Hospital and other health care defendants filed motion to dismiss and/or strike.

Holding: The District Court, Gibson, J., held that physician's original and amended complaints would be dismissed and physician to would be permitted to file a second amended complaint where 522 to 655 separate paragraphs were excessive under the notice pleading standard and where many of the physician's averments constituted scandalous, impertinent and unnecessary material.

Motion granted.

West Headnotes

[1] Federal Civil Procedure ⇨657.5(1)

170Ak657.5(1)Most Cited Cases

Pro se complaints are held to less stringent standards than those filed by counsel; however, basic pleading requirements under the Federal Rules of Civil Procedure apply to self-represented and counseled plaintiffs alike.

[2] Federal Civil Procedure ⇨1129.1

170Ak1129.1Most Cited Cases

Court's authority to strike a pleading should be reserved for a pleading which is so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[3] Federal Civil Procedure ⇨1781

170Ak1781Most Cited Cases

[3] Federal Civil Procedure ⇨1838

170Ak1838Most Cited Cases

Physician's original and amended complaints would be dismissed and physician would be permitted to file a second amended complaint where 522 to 655 separate paragraphs were excessive under the notice pleading standard and where many of the physician's averments constituted scandalous, impertinent and unnecessary

material, some of which was irrelevant and some of which at best might constitute evidence; to require hospital and other health care defendants to respond to each and every averment contained within the 522 or 655 paragraphs was unfairly burdensome. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

***410** James R. DiFrancesco, Esq., Johnstown, PA, C. William Hinnant, Jr., Esq., M.D., Anderson, SC, for Plaintiff.

Rick Bode, Esq., Alyson J. Kirleis, Esq., Dickie, McCamey & Chilcote, Pittsburgh, PA, David R. Johnson, Esq., Thomson, Rhodes & Cowie, Pittsburgh, PA, David J. Porter, Esq., Buchanan Ingersoll, Pittsburgh, PA, for Defendants.

MEMORANDUM OPINION AND ORDER

GIBSON, District Judge.

This case comes before the Court on Erden Fikri, M.D., Dinesh Mathur, M.D., Vincent Fiorica, M.D., Terry Wahl, M.D., David R. Davis, Sanders Ergas, M.D., P. James Ridella, M.D., Bhaskaran Murali, M.D., Will H. Farthing, M.D., Brian Gunnlaugson, M.D., Richard Cartwright, M.D., Denise Weisbrodt, R.N., William M. Carney, M.D., Harvey Slater, M.D., George H. Benz, Jr., M.D., Stewart M. Flam, R. Joseph Federowicz, Dickey, McCamey & Chilcote (a Professional Corporation), UPMC Health System, Inc., and UPMC Lee Regional Hospital's (hereinafter "Lee Defendants") Motion to Dismiss and/or Strike and/or Transfer at Document No. 23, [FN1] Document No. 61, [FN2] and Document No. 95. In consideration of the Defendants' Motion to Dismiss and/or Strike, Steven Untracht's (hereinafter "Plaintiff") Brief in Opposition to Defendants' Motion to Dismiss and/or Strike at Document Nos. 49 and 50, and the complaints filed by Plaintiff, the Court grants the Lee Defendants' Motion to Dismiss and/or Strike for the following reasons.

FN1. The Defendants originally filed the Motion to Dismiss and/or Strike with the Eastern District Court of Pennsylvania. (Document No. 23). Subsequent to the filing, the Eastern District of Pennsylvania granted the Defendants' Motion to Transfer without prejudice. The remaining Motions were left undecided by the Eastern District of Pennsylvania. Thereafter, the Defendants re-filed a substantially similar Motion to Dismiss and/or Strike at Document No. 95 with the Western District Court of Pennsylvania.

FN2. Without Leave of Court, Steven H. Untract, M.D. (hereinafter "Plaintiff") filed an Amended Complaint (Document No. 52). Nevertheless, the Defendants responded to the Plaintiff's Amended Complaint with Defendants' Motion to Dismiss and/or Strike at Document No. 61. The Defendants have incorporated Document Nos. 23 & 61 by reference in Document No. 95. Accordingly, the Court considers each of these motions in its deliberations.

JURISDICTION

Jurisdiction in the United States District Court for the Western District of Pennsylvania is based upon 28 U.S.C. § 1331, which provides that the "district court shall have original jurisdiction in all civil ***411** actions arising under the Constitution, laws, or treatises of the United States." 28 U.S.C. § 1331. Specifically, the Plaintiff asserts violations of federal antitrust laws under the Sherman Act, 15 U.S.C. §§ 1-2, and a civil rights violation pursuant to 42 U.S.C. § 1983. [FN3]

FN3. The Plaintiff conceded in his Response Brief at Document No. 50 that federal jurisdiction did not exist based upon diversity jurisdiction pursuant to 28 U.S.C. § 1332; however, the Plaintiff continues to assert that jurisdiction is proper in the

United States District Court for the Western District of Pennsylvania based upon "three other independent grounds: state action, civil rights violation (under color of law wholly apart from state action) and antitrust violation." (Document No. 50).

FACTUAL AND PROCEDURAL BACKGROUND

On May 14, 2003, the Plaintiff filed a pro se complaint in the United States District Court of Eastern Pennsylvania against thirty-six defendants, including individual physicians and health care professionals, a university, a law firm, an anesthesiology group, two health systems and four medical facilities. (Document No. 1). The Plaintiff also named John Does one through twenty in his complaint. *Id.*

The Plaintiff's original complaint contained 522 paragraphs and fifteen counts alleging Sherman Act violations, tortious interference with prospective economic advantage, § 1983 civil rights violations, negligence, perjury and defamation. (Document No. 1).

Thereafter, on June 9, 2003, the Lee Defendants filed a Motion to Dismiss, Strike and/or Transfer the case from the Eastern District of Pennsylvania to the Western District of Pennsylvania pursuant to Federal Rules of Civil Procedure 8(e), 12(f), and 12(b)(6). (Document No. 23). However, before the Court was able to address the various motions filed by Lee Defendants, the Plaintiff, without leave of Court, filed an amended complaint on June 26, 2003. (Document No. 52).

The amended complaint contained a new cause of action against all Lee Defendants entitled "intentional infliction of emotional distress". (Document Nos. 52 & 61). Additionally, the amended complaint seemed to have changed the characterization of the original "perjury" claims to "fraud and/or civil right[s] violation". *Id.* Consequently,

the amended complaint contained approximately 655 paragraphs in 112 pages. (Document No. 52).

On July 10, 2003, the Lee Defendants filed another Motion to Dismiss and/or Strike and/or Transfer Plaintiff's Amended Complaint pursuant to Federal Rules of Civil Procedure 8(e), 12(f) and 12(b)(6) [FN4]. (Document No. 61).

> FN4. Lee Defendants incorporated by reference their prior motion to dismiss as Document No. 23. (Document No. 61).

On July 25, 2003, the Eastern District Court of Pennsylvania determined that venue was proper in the Western District and transferred the above-captioned case to this Court. (Document No. 80). However, the pending motions to dismiss and/or strike were not resolved by the Eastern District Court and determinations of these motions were left to the discretion of the Western District Court. (Document No. 80).

On February 2, 2004, Lee Defendants filed a third Motion to Dismiss and/or to Strike Plaintiff's Amended Complaint. [FN5] (Document No. 95). As in the prior two motions, Lee Defendants seek dismissal of the Plaintiff's original complaint and amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Document Nos. 23, 61, 95. In the alternative, ***412** they request that the complaint should be stricken pursuant to Federal Rule of Civil Procedure 8(e) and 12(f) "because it contains redundant, immaterial, impertinent and scandalous material and is not simple, concise and direct." (Document Nos. 23, 61 & 95).

> FN5. Lee Defendants incorporated by reference their prior motions to dismiss at Document Nos. 23 and 61. (Document No. 95).

The Plaintiff filed his first Answer to [Lee] Defendants' Motion to Dismiss and/or Strike and/or Transfer on June 26, 2003. (Document No. 49). Thereafter, the Plaintiff filed his second Answer to [Lee] Defendants' Motion to Dismiss and/or Strike and/or Transfer Plaintiff's Amended Complaint on July 16, 2003. (Document No. 67).

STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide, in pertinent part that "[a] pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief ...." Fed.R.Civ.P. 8(a)(2); *see In re Catanella, E.F. Hutton & Co., Inc. Securities Litigation*, 583 F.Supp. 1388, 1401 (D.C.Pa.1984). Rule8(e) also provides in relevant part, that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed.R.Civ.P. 8(e). This simplified "notice pleading" "is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Brejcak v. County of Bucks*, 2004 WL 377675, *2 (E.D.Pa.2004); *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). However, Rule 8(a)(2) "must be applied with some logic and common sense. The length of a pleading will depend upon a number of factors, not the least of which is the complexity of the case." *In re Catanella, E.F. Hutton & Co., Inc.*, 583 F.Supp. at 1401.

Rule 12(f) provides that when a plaintiff has set forth "any redundant, immaterial, impertinent, or scandalous matter", a court may order that those pleadings be stricken from the record. Fed.R.Civ.P. 12(f). Although Rule 12 is not to be construed to repeal the liberal pleading standard set forth in Rule 8(a)(2), Rule 12 authorizes a party to move for the following:

(e) **Motion for More Definite Statement**. If a plead-

ing to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. [FN6]

> FN6. Although Lee Defendants did not specifically cite Rule 12(e) in their aforementioned motions, the Court observes that throughout Lee Defendants' motions, they have articulated an inability to frame an appropriate response to Plaintiff's complaint due to the dense, verbose, and ambiguous claims raised by the Plaintiff in his 522 paragraph original complaint. (Document No. 23). Additionally, the Court notes that during a status conference held on May 25, 2004, Lee Defendants raised the argument that they were unable to respond to the voluminous and vague averments set forth by the Plaintiff in his initial complaint and in his amended complaint at Document No. 52. Accordingly, the Court considers Lee Defendants' various motions to include an additional request to direct the Plaintiff to frame more definite averments in his complaint.

(f) **Motion to Strike**. Upon motion made by a party before responding to a pleading or, if no responsive pleading is ***413** permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed.R.Civ.P. 12(e), (f).

[1] The Court also observes that pro se complaints are held to less stringent standards than those filed by counsel. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). However, basic pleading requirements under the Federal Rules of Civil Procedure apply to self-represented and counseled plaintiffs alike. *Wynder v. McMahon*, 360 F.3d 73 (2d Cir.2004); *Holsey v. Collins*, 90 F.R.D. 122 (D.C.Md.1981).

Based upon the above standards set forth in the Federal Rules of Civil Procedure and relevant case law, the Court reviews Lee Defendants' motions and Plaintiff's responses thereto.

DISCUSSION

The Plaintiff filed an original complaint that details approximately fifteen counts [FN7] against a combination of defendants, including approximately ten individual defendants who were at all relevant times physicians with staff privileges at UMPC Lee. [FN8] Also, as stated above, the Plaintiff's original complaint includes approximately 522 paragraphs in 96 pages. (Document No. 1). The Court further observes that the Plaintiff's amended complaint includes approximately 655 paragraphs in 112 pages. (Document No. 52).

> FN7. The Court observes that after the Plaintiff filed his complaint and amended complaint, this Court granted Plaintiff's Motion for Consent Order (Document No. 110) which dismissed Plaintiff's wrongful death claim at Count XV with prejudice. (*See* Order, dated December 22, 2004).

> FN8. The Court observes the following individual defendants and their relationship with the Plaintiff: Dr. Ridella and Dr. Carney were members of the credentialing committee at UPMC Lee who participated in the internal hearings and proceedings

> pertaining to the Plaintiff's credentialing at UPMC Lee (Document No. 95-1); Dr. Wahl was the Medical Director of UPMC Lee, and Dr. Cartwright is the current Medical Director at UPMC Lee, *Id;* Mr. Davis, also a Defendant in the case *sub judice,* is the President and CEO of UPMC Lee, and Ms. Weisbrodt, another Defendant in this case, is the Risk Manager at UPMC Lee, *Id.;* Dr. Slater and Dr. Benz are physicians who were retained as expert witnesses by UPMC Lee, and they presented testimony during various internal hearings and proceedings pertaining to the Plaintiff's credentialing at UPMC Lee, *Id.;* and Attorney Federowicz, Attorney Flam, and Dickie, McCamey and Chilcote, P.C., are Defendants who were retained by UPMC Lee to represent UPMC Lee in the internal hearings and proceedings pertaining to the Plaintiff's credentialing at UPMC Lee. *Id.*

In response to the Plaintiff's complaints, the Lee Defendants have argued that Plaintiff's complaints are prejudicial in that the Lee Defendants are "compelled to weed through the verbiage and respond to the material therein or risk having the material deemed admitted." (Document Nos. 23, 61, & 95) (*quoting* Barrett v. City of Allentown, 152 F.R.D. 50, 53 (E.D.Pa.1993)). The Lee Defendants also assert that the complaints are in violation of Rule 12(f) and Rule 8 in that each complaint "is dense, verbose, and 'contains so many factual averments of such specificity that it is impossible to discern which facts support, or are even relevant to, which claims.' " *Id.* (*quoting* Gonzales v. Wing, 167 F.R.D. 352, 354 (N.D.N.Y.1996)).

Lee Defendants have also alleged that the Plaintiff's complaints are "vexatious in nature". (Document No. 95). For example, Lee Defendants assert that the Plaintiff's complaints contain "extraneous self-serving averments" and "various defamatory remarks" regarding defendant physicians'***414** abilities as physicians. *Id.* Additionally, Lee Defendants direct the Court's attention to the first and last names of patients, as well as the medical care

provided to those patients, which are included in the Plaintiff's complaints. *Id.* According to Lee Defendants, publishing the names of Lee Defendants' prior patients, as well as the care that they received, is "scandalous and violate[s] confidentiality laws pertaining to a patient's privacy." *Id.* (citing to 42 Pa.C.S. § 5929).

Initially, the Court observes that the pro se Plaintiff in the case *sub judice* should be granted certain liberties in order to present a "short and plain statement" of his multiple claims against the multiple defendants named in this civil action. However, the Court also observes that the Plaintiff's original complaint, as well as his amended complaint, run afoul of the letter and spirit of the Federal Rules of Civil Procedure. *See Brejcak*, 2004 WL 377675 at *7.

The Court notes that the substance of the Plaintiff's original complaint and amended complaint set forth allegations in meticulous, but unnecessary detail, such that it is nearly impossible to extract those averments which pertain to Plaintiff's stated claims. Specifically, the Plaintiff's complaints state with excessive detail the factual background that underpins his claims. Indeed, in the Plaintiff's amended complaint, paragraphs one through sixty-three recount in repetitive and impertinent language the events leading up to July of 1999.

In July of 1999, the UPMC Lee Medical Staff Credentials Committee (hereinafter "Credentials Committee") informed the Plaintiff that during his 1997-1998 appointment period with the hospital, there were approximately six cases with quality concerns. (Document No. 1). As a result, the Credentials Committee arranged for an independent review of the Plaintiff's cases in question. *Id.* Apparently, the Plaintiff takes issue with the independent review process.

The Court observes that in the Plaintiff's original and amended complaints, before the Plaintiff even addresses

his claims regarding the independent review process, the Plaintiff's averments stray far from addressing any legal claims. Rather, in paragraphs one through sixty-three, the Plaintiff recounts self-serving accolades regarding the Plaintiff's participation in charitable organizations. (Document No. 52). The Plaintiff's complaints also include letters and quotes from his peers as evidence of the Plaintiff's "superior" performance as a physician. *Id.*

The Plaintiff also engages in personal attacks against defendant-physicians by recounting through self-made graphs and personally-generated statistical data the "inadequate" care provided by those defendants. *Id.* at ¶ 34. For example, one graph represents the number of procedures performed by the Plaintiff against the percentage rate of complications allegedly experienced by his patients. *Id.* at p. 7. Conversely, another graph developed by the Plaintiff represents the number of procedures performed by Defendant Dr. Benz against the percentage rate of complications allegedly experienced by Dr. Benz' patients. *Id.* at p. 54.

The Court determines that the needless factual detail and the verbose nature of the Plaintiff's complaints are unfairly burdensome to Lee Defendants. *See* Brejcak, 2004 WL 377675 at *7 (*quoting* Drysdale v. Woerth, 1998 WL 966020, *2 (E.D.Pa.1998))(dismissing a prolix complaint that "describe[d] in unnecessary and burdensome detail every instance of Defendants' alleged misconduct");see also Burks v. City of Philadelphia, 904 F.Supp. 421, 424 (E.D.Pa.1995) ("dismissing a fact-laden complaint that 'describe[d] in unnecessary, ***415** burdensome, and often improper argumentative detail, every instance of alleged racial discrimination perpetrated by Defendants over the period of 1993 and 1994' ") (quoted in Brejcak, 2004 WL 377675 at *7).

Although the Plaintiff's answers to Lee Defendants' motions clearly deny the legal arguments presented by Lee Defendants (Document Nos. 49 & 67), the Plaintiff argues that he should be entitled to "amend his Com-

plaint as many times as is necessary to correct any of Defendants' objections." (Document No. 67, ¶ 11). The Court, however, disagrees with Plaintiff's position.

[2] The Court is aware that the exercise of Rule 12(f) authority "should be reserved for a pleading which is so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised." *Martin v. Warrington*, 2002 WL 341000, *3, (E.D.Pa.2002)(*quoting Simmons v. Abruzzo*, 49 F.3d 83, 89 (2d Cir.1995); *see also Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir.1988)); *Nagel v. Pocono Medical Center*, 168 F.R.D. 22(M.D.Pa.1996). Also, "[w]here pleadings are laden with unnecessary factual narrative, courts have stricken them." *Martin*, 2002 WL 341000 at *3;*Johns-Manville Sales Corp. v. Chicago Title & Trust Co.*, 261 F.Supp. 905, 908 (N.D.Ill.1966), (the district court dismissed the complaint which devoted thirty-nine pages to a single count and included twenty-four exhibits); *but see Burks v. City of Philadelphia*, 904 F.Supp. 421, 424 (E.D.Pa.1995) (district court determined that the complaint was "a fact-laden, 36-page, 128-paragraph narrative that describes in unnecessary, burdensome, and often improper argumentative detail, every instance of alleged racial discrimination" but declined to dismiss complaint); *Lundy v. Dermik Laboratories, Inc.*, 1995 WL 622893 (E.D.Pa. Oct. 17, 1995)(the district court noted that plaintiff's fifty-nine paragraph complaint failed to comply with Rule 8 but declined to dismiss it); *Associated Orchestra Leaders of Greater Philadelphia v. Philadelphia Musical Soc. Local 77, of Am. Federation of Musicians*, 203 F.Supp. 755, 756 (E.D.Pa.1962)(the district court stated that the thirty-six page complaint as a "veritable compendium of prolixity," but declined to grant the motion to dismiss.)

[3] Although there is no precise calculation determining at what length a complaint becomes objectionable, the Court determines that, under the circumstances present in this case, it is reasonable to conclude that 522 to 655 separate paragraphs are excessive under the notice pleading stan-

dard set forth in the Federal Rules of Civil Procedure. To require Lee Defendants to respond to each and every averment contained within 522 or 655 paragraphs is unfairly burdensome, especially when the Court notes that some paragraphs contained within the original and amended complaint are redundant and impertinent. Clearly, Plaintiff's complaints present a direct contradiction to the spirit of Rule 8 which requires a "short and plain statement" under notice pleading standards.

Furthermore, the Court observes that many of the Plaintiff's averments set forth in the original and amended complaints constitute "scandalous, impertinent and unnecessary material, some of which is irrelevant and some of which at best might constitute evidence." *Drysdale v. Woerth*, 1998 WL 966020, *2 (E.D.Pa.1998). Additionally, the Court notes that the Federal Rules of Civil Procedure discourage the pleading of evidence. *Id.*; *Brejcak*, 2004 WL 377675 at *8. Again, the Court determines that the Plaintiff's complaints constitute a dramatic departure from the spirit of the Federal Rules of Civil Procedure, and that Lee Defendants cannot reasonably ***416** be required to frame a responsive answer for either of the complaints. Accordingly, the Lee Defendants' motion to dismiss the Plaintiff's entire original complaint and amended complaint for the failure to comply with Rule 8(a)(2) will be granted and Plaintiff will be permitted to file a second amended complaint. An appropriate order follows.

ORDER

AND NOW, this 6th day of April, 2005, in accordance with this Court's Memorandum Opinion, and based upon the Plaintiff's failure to comply with Federal Rule of Civil Procedure 8(a)(2), **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss and/or Strike the Plaintiff's Original and Amended Complaint in their entirety is **GRANTED**. (Document Nos. 23, 61, and 95-1, 95-2).

IT IS FURTHER ORDERED that the Plaintiff may file

a second amended complaint consistent with this Court's Memorandum Opinion within twenty (20) days of the date of this Order, and upon failure to so plead, the matter will be marked closed.

IT IS FURTHER ORDERED that based upon this Court's Memorandum Opinion and Order, the following motions are rendered moot: Document Nos. 25, 26, 27, 30, 35, 56, 57, 58, 65 and 86-1.

THIRD CIRCUIT ORDER, OCTOBER 30, 2007, DENYING PETITION FOR REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 06-4221

STEVEN H. UNTRACHT, M.D., PH.D., F.A.C.S.

V.

M.D. ERDEN FIKRI;M.D. DINESH MATHUR; M.D. VINCENT FIORICA; M.D. TERRY WAHL; DAVID R. DAVIS; M.D. SANDERS ERGAS; M.D. P. JAMES RIDELLA; M.D. BHASKARAN MURALI; WILL H. FARTHING, M.D.; BRIAN GUNNLAUGSON, M.D.; RICHARD CARTWRIGHT, M.D.; DENISE WEISBRODT, R.N.; RICHARD SALUZZO, M.D.; JACOB KOLFF, M.D.; BRUCE DUKE, M.D.; NARENDRA PAI, M.D.; WILLIAM FRITZ, M.D.; PAUL WEYGANDT, M.D.; NICHOLAS JACOBS; JAMES CHURCH, M.D.; ROBERT D. FRY, M.D.; LARRY KAISER, M.D.; WILLIAM M. CARNEY, M.D.; HARVEY SLATER, M.D.; GEORGE H. BENZ, JR., M .D.; UNIVERSITY OF PENNSYLVANIA; CLEVELAND CLINIC FOUNDATION; STEWART M. FLAM; R. JOSEPH FEDEROWICZ; DICKIE MCCAMEY & CHILCOTE, A PROFESSIONAL CORPORATION; ASSOCIATED ANESTHESIOLOGISTS OF JOHNSTOWN; UPMC HEALTH SYSTEM, INC.; UPMC LEE REGIONAL HOSPITAL; CONEMAUGH HEALTH SYSTEM; MEMORIAL MEDICAL CENTER; WINDBER MEDICAL CENTER; JOHN DOES 1-20; LEE REGIONAL HEALTH SYSTEM, INC.; LEE REGIONAL HEALTH SYSTEM FOUNDATION, INC.

Steven H. Untrachi,

Appellant.

Before: BARRY, AMBRO, FUENTES, SMITH, CHAGARES, HARDIMAN, JORDAN and ROTH*, Circuit Judges

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ORDER

The petition for rehearing en banc filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH

Circuit Judge

Dated: 30 October 2007

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* Judge Roth's vote is limited to panel rehearing only.

BRIEF OF *AMICUS CURIAE*, THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, TO THE THIRD CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 06-4221

STEVEN H. UNTRACHT, M.D., Ph.D., F.A.C.S.
Plaintiff below,
Appellant,
v.

ERDEN FIKRI, M.D., et al.
Defendants below,
Appellees.

An appeal from the United States District Court for the Western District of Pennsylvania
Case No. 3:03 CV 199

BRIEF FOR AMICUS CURIAE THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS FILED IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSAL OF THE JUDGMENT BELOW

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December 14, 2006

CORPORATE DISCLOSURE STATEMENT

Steven H. Untracht, M.D. v. Erden Fikri, M.D., et al., No. 06-4221

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Amicus Curiae* The Association of American Physicians and Surgeons makes the following disclosure:

1) For non-governmental corporate parties please list all parent

corporations:

None.

2) For non-governmental corporate parties please list all publicly held

companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the

bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trus-

tee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Dated: December 14, 2006

/s/ Andrew L. Schlafly
Andrew L. Schlafly
Attorney for The Association of American Physicians and Surgeons

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STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit national organization consisting of thousands of physicians in all specialties. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service of patients who entrust their care to the medical profession. The motto of AAPS is "omnia pro aegroto," or "all for the patient." AAPS files *amicus* briefs in cases of high importance to the medical profession, like this one. In 2006, the Third Circuit cited an AAPS amicus brief in the first paragraph of the decision. *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). AAPS has successfully filed *amicus* briefs in other appellate cases also. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court Justice Kennedy frequently citing AAPS submission); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

Of particular concern to AAPS is the growing misuse of peer review commonly known as "sham peer review." This includes anticompetitive manipulation of peer review to eliminate popular physicians from the market, or to retaliate against physicians who are outspoken in favor of improved patient care. Sham peer review is very real and has a dreadful chilling effect on the entire profession. Competition is important in all walks of life, but it is absolutely essential in improving how patients are treated at our publicly accessible hospitals and facilities. AAPS submits this brief to emphasize that legal accountability for anticompetitive physicians and hospitals must be established to ensure that physicians can provide the

best possible care to their patients without fear of retaliation by disgruntled competitors or hospitals.

AAPS has a Sham Peer Review Committee to review cases such as this one, and the AAPS Committee reviewed the entire record of the fair hearing at defendant UPMC Lee Regional Hospital. AAPS found particularly impressive the statements of the independent peer-review expert, Dr. Mitchell Nudelman (Doc. No. 113), who found that defendant hospitals Lee and Conemaugh had acted unreasonably against Dr. Untracht. In addition, AAPS's statistician analyzed the clinical outcome data that were reported by the hospitals of Lee, Conemaugh and Windber to the Pennsylvania Healthcare Cost Containment Council between 1995 and 2002, also part of the record below. AAPS found that Dr. Untracht's performance had this in common with other victims of sham peer review: Dr. Untracht treated sicker patients. But even with a sicker patient population, Dr. Untracht had comparable and sometimes lower complication rates and lengths of stay relative to his colleagues. Dr. Untracht's overall mortality rate was lower than expected, and lower than that of his competitors.

AAPS respectfully submits this *amicus* brief to ensure that the patients of Dr. Untracht, and patients of other physicians like him, do not lose the superior services of physicians caring for riskier patients. The elimination of Dr. Untracht from the medical market in his community requires meaningful judicial scrutiny of sham peer review.

BACKGROUND

Allegations of an anticompetitive peer review are serious, because removal of a physician directly harms his patients and indirectly harms all patients. Moreover, the destruction of a physician's career through an unjustified

peer review has a chilling effect on many other physicians in the region.

Hospital economics is similar to other industries except for one essential distinction: there is a federally mandated database in the hospital industry called the National Practitioner Data Bank ("Data Bank"). This list, which operates as a blacklist, is sanctioned by federal law but has enormous potential for abuse. Some physicians and hospital administrators exploit it to destroy competitors and whistleblowers alike.

Virtually no physician entered into this Data Bank can survive professionally. The best a physician who has been entered into this Data Bank can hope for is to relocate to a rural area and wait until someone else tries to use the Data Bank entry against him. More often, when a physician applies for privileges with a hospital, it checks the Data Bank and, if there is an adverse entry, the hospital usually denies privileges to the physician. With hospitals fending off malpractice actions, they have little reason to see past a black mark in this Data Bank to allow a physician on staff.

This awesome power is sometimes abused by disgruntled physicians and hospital administrators. *See, e.g.*, Gail Weiss, "Is Peer Review Worth Saving?", Medical Economics (Feb. 18, 2005); Ron Wood, "Jury says hospital defamed doctor, harmed him financially," The Morning News (Jan. 13, 2004); John Zicconi, "Due Process or Professional Assassination?", Unique Opportunities (March/April 2001); William W. Parmley, "Clinical Peer Review or Competitive Hatchet Job," 36 Journal of the American College of Cardiology No. 7 (2000); David W. Townend, "Hospital peer review is a kangaroo court," Medical Economics (Feb. 7, 2000).

The economic incentive for abuse of peer review is obvious and undeniable. If there are a few surgeons in a market, then elimination of one of those surgeons will cause the incomes of the others to increase dramatically.

Similarly, if a physician is a whistleblower whose vocal complaints about a hospital could cost it millions of dollars in malpractice liability or government fines, then the elimination of that physician will save the hospital millions. Physicians and hospitals are attempting to maximize their revenues and profits like anyone else, and the unique National Practitioner Data Bank provides the means to destroy a competitor.

This growing misuse of peer review and the Data Bank has become so widespread that it has acquired a descriptive name: "sham peer review." What appears to be "peer review" under the pretext of protecting patients can in fact be a "sham." The incentive for misusing this power is even greater when someone suffers a drop in income because he has a more successful competitor. Physicians and hospitals are motivated by money just like everyone else, and the current system invites abuse. *See, e.g.*, Jeff Chu, "Doctors Who Hurt Doctors," Time 52 (Aug. 15, 2005) ("Th[e] system is too open to manipulation and needs reform, says the 4,000-member American Association [sic] of Physicians and Surgeons."). If a similar type of peer review were available to retail stores, then it would be in the self-interest of a struggling K-Mart to try "sham peer review" to end the competition from Wal-Mart. Such misuse would not be allowed in the retail context, and it should not be allowed in the medical context either.

Plaintiff Steven Untracht, M.D., succeeded in a manner that caused drops in income to his competitor-physicians. Defendant Fikri lost 50% of his income during the first three years after Dr. Untracht came to Johnstown. (*A324-325*) By all independent accounts Dr. Untracht was an exemplary surgeon, and even an extraordinary one. (*A300*) But the better he was, the more his competitors wanted him eliminated. Defendant Fikri even began complaining to defendant Mathur that he was referring too many patients to Dr. Untracht and not enough to Fikri. (*A324*) In the face of drops in income it is

predictable that the competitors will look for ways to eliminate the cause. "Sham peer review" provides the means to that end. By combining forces among themselves and with the hospital, a few physicians can easily manipulate a peer review into suspending and removing a physician's privileges. Once the hospital is on board in this mission all of its employee-physicians generally cooperate; they are dependent on the hospital for their livelihood. Anyone who stands up for the accused physician, even a physician in independent practice, would be taking a risk himself. The adverse outcome is a *fait accompli*, and the resulting entry in the Data Bank blacklists that physician for life. This process is remarkably easy and increasingly abused.

Unlike other courts that have recognized the importance of evaluating the merit or lack thereof of a peer review action, see *Feyz v. Mercy Mem'l Hosp.*, 475 Mich. 663 (2006) (en banc), the court below never addressed the core issue in this case: the unreasonableness of the peer review of Dr. Untracht. Dr. Untracht had numerous physicians offering to testify on his behalf, which underscores how frivolous the charges were against him. In most peer reviews, even in sham peer reviews, other physicians fear retaliation themselves too much to defend a victim. But the allegations against Dr. Untracht were so baseless that these physicians cried out for rebuttal. Yet defendant UPMC Lee Regional Hospital denied Dr. Untracht the opportunity to present medical testimony in his defense, as explained in Argument Point II, *infra*. The effect was to destroy Dr. Untracht, and report him to the National Practitioner Data Bank.

What legal protections are there against this sort of anticompetitive conduct? The Sherman Act applies to physicians and hospitals like everyone else. Anticompetitive conduct that falls under the Sherman Act is illegal and actionable. There is no exemption from that Act for self-serving behavior supposedly taken for public safety. Competition is what helps patients the most, and compe-

tition clearly suffers when a physician or any competitor is removed from the market.

If a physician were truly a danger to patients, then the state medical board can and will restrict or revoke his license to practice medicine. Patients themselves will abandon such a physician, just as shoppers will not continuing buying bad products. But who would listen to a demand by one company that another be prohibited from selling a popular item? Such demand would be so inherently anticompetitive and self-serving that it would not be taken seriously. Yet the peer review in this case, and sham peer review generally, embraces that same type of anticompetitive conduct.

Peer review is inherently "concerted action" within the meaning of Section 1 of the Sherman Act. Here, it consisted of the concerted conduct of several competitors of Dr. Untracht with every financial motive to destroy him. The hospitals likewise had incentives to join the effort. The elimination of Dr. Untracht from the market by this concerted effort was as predictable as it was unlawful. Dr. Untracht plainly has a cause of action under the Sherman Act to recover from this restraint of trade.

Legitimate peer review disallows participation by competitors in the process and adheres to appropriate due process standards such that statutory immunity applies. In contrast, here the defendant hospital Lee's executive committee even allowed defendant Murali, Dr. Untracht's direct competitor, to vote to restrict Dr. Untracht's privileges. (*A330-331*) Sham peer review must be held fully accountable under the antitrust laws or else patients will suffer greatly from the loss of good physicians from the market.

ARGUMENT

As this Circuit held in 2006 in affirming a jury verdict in favor of a physician and against a state hospital, "the state of healthcare" consists of "matters of public concern." *Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006) (citing *Scheiner v. New York City Health and Hospitals*, 152 F. Supp. 2d 487, 495-96 (S.D.N.Y. 2001); *Kattar v. Three Rivers Area Hosp. Auth.*, 52 F. Supp. 2d 789, 799 (W.D. Mich. 1999)).

The court below erred in at least three ways in denying plaintiff relief. First, it misapplied and implicitly contradicted this Circuit's holding in *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268 (3d Cir. 1999). Second, the lower court found a lack of state action, but the federally mandated Data Bank and its operation here implicates the full power of the state. Third, the court below found no violation of due process because the Health Care Quality Improvement Act of 1986 (HCQIA) does not expressly establish a private cause of action, but that ruling cannot stand if there is state action. HCQIA reflects the appropriate due process, and with state action that process is due regardless of whether HCQIA itself creates a private cause of action.

I. The Lower Court Erred in Misapplying the *Angelico* Holding on Antitrust Standing and Injury.

The court below contravened the holding of this Circuit in *Angelico*. There, as here, the physician was allegedly subjected to an anticompetitive peer review. Plaintiff argued for application of the *Angelico* decision to this case, but the trial court said that it "does not agree." *Untracht v. Fikri*, 2006 U.S. Dist. LEXIS 61896, at *46 (W.D. Pa. Aug. 30, 2006) (*A41*). Yet the *Angelico* decision had al-

ready rejected the same approach taken by the court below here.

In *Angelico*, the trial court granted the hospitals' motion for summary judgment on the same grounds that the court below granted it here, holding that plaintiff had failed to establish standing and had not suffered antitrust injury. This Circuit then unanimously reversed. "Turning to the second element, whether Angelico's alleged injury is of the type the antitrust laws were meant to redress, we conclude that the injury he suffered, when shut out of competition for anticompetitive reasons, is indeed among those the antitrust laws were designed to prevent." *Angelico v. Lehigh Valley Hospital, Inc.*, 184 F.3d 268, 274 (3d Cir. 1999). The *Angelico* court recited this Circuit's holding in *Brader v. Allegheny General Hosp.*, 64 F.3d 869 (3d Cir. 1995), in which this Court reversed a dismissal of similar claims by a physician under Sections 1 and 2 of the Sherman Act. As this *Angelico* Court reiterated, "Brader, as a potential competitor shut out of a market by a purported group boycott, had alleged the type of injury protected by the antitrust laws." *Angelico*, 184 F.3d at 274. The conclusion in *Brader* and *Angelico* is apt here: "the type of injury alleged by Brader (the loss of income due to an inability to practice in the relevant market area) is directly related to the illegal activity in which the defendant allegedly engaged: a conspiracy to exclude Brader from the relevant market." *Brader*, 64 F.3d at 877.

The reason given by the court below in dismissing plaintiff's case was its view that he "offers no evidence of a conspiracy, an essential part of an antitrust violation, between any of the Defendants." *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *47 (*A41*). But the court below effectively denied plaintiff full discovery, allowing defendants to refuse discovery requests and move for summary judgment, a common litigation tactic by hospitals in these cases. (Appellant's Brief at 3-8, 56). When presented with an analogous lack of discovery on the part of the defendants in *Angelico*, this Circuit held that the plain-

tiff's relevant allegations should therefore be accepted as true. *Angelico*, 184 F.3d at 274. *Cf.* Federal Rule of Civil Procedure 37(c)(1) ("A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial.") Plaintiff's allegation of concerted action below should have been accepted as true for the purpose of defendants' dispositive motions.

More generally, the *sine qua non* of all peer reviews, including legitimate ones, is concerted action. It is impossible to conduct a peer review proceeding without concerted action, as physicians work with the hospital with a common goal and agreement to take an adverse action against a physician on staff. Saying that a peer review action is not concerted action is like saying that a marching band does not walk in a concerted manner. Everything it does is concerted and by agreement. The issue is not whether a peer review action is concerted – it plainly is – but whether it reasonably restrains trade in a particular case. Yet the court below refused to reach that central question of this case.

Instead, the trial court went beyond the undisputed facts and substituted its own speculation about the nature of peer review, insisting that its speculation "disproves" a conspiracy among multiple hospitals. "In fact, Plaintiff offers evidence to the Court that disproves a conspiracy. First, Plaintiff offers evidence that while the adverse actions were being taken against him at Lee he notified Conemaugh and Windber and that, upon review, each hospital renewed his clinical privileges multiple times." *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *47 (*A42*). But it is typical in a sham peer review for the concerted action or conspiracy to be between physicians and one hospital, and then later between the same physicians and another hospital, rather than directly between multiple hospitals. The disgruntled physician-competitors form the hub in

such hub-and-spoke conspiracies, which are well-recognized in the law. A hub-and-spoke conspiracy is fully actionable under antitrust laws, and "disproof" of a direct conspiracy between different hospitals does not in any way disprove the existence of an overall conspiracy.

The trial court relied entirely on its own theory that "Lee and Conemaugh were not acting in concert, *i.e.*, conspiring, but were actually acting quite independently," without recognizing how sham peer review typically works. *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *48 (*A42*). As has been well-documented in medical journals, sham peer review can be driven by physicians at hospitals, often under pretextual criticism such as charges that a physician is "disruptive". Building a record of "disruptive" behavior at a hospital takes time, but under the stressful conditions of an operating room most surgeons need to advocate for patients, sometimes even in a loud and insistent manner. This is not "disruptive", yet it hospitals are increasingly labeling it so. Lawrence R. Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," 9 Journal of American Physicians and Surgeons 68 (Fall 2004) ("The term 'disruptive physician' is purposely general, vague, subjective, and undefined so that hospital administrators can interpret it to mean whatever they wish.").

The charges asserted by defendants against Dr. Untracht accused him of histrionics and problems with reasonableness, collegiality and professionalism. (Doc. No. 147, Ex. 10; Doc. No. 155, at 21, 23). Few patients facing surgery would list personality at the top of their priorities for picking a good surgeon. The volume and nature of the petty complaints against Dr. Untracht reveal a desire to eliminate him for any reason. Other courts have already seen through the pretext of the "disruptive physician." "At the outset, we reject [defendant's] suggestion at oral argument that a finding of *potential* disruption could be sufficient to outweigh [plaintiff's] interests. To the contrary, in cases such as this involving

speech on matters of significant public concern, a showing of *actual* disruption is required. ... Moreover, a finding of actual disruption, while necessary, is not sufficient to a determination that the employee's speech is not protected." *Zamboni v. Stamler*, 847 F.2d 73, 78-79 (3d. Cir.), *cert. denied*, 488 U.S. 899 (1988). *See also Clark v. Columbia/HCA Info. Servs.*, 25 P.3d 215 (Sup. Ct. Nev. 2001) (denying immunity to HCA for revoking privileges based upon the pretext of disruptive behavior by the physician); *Rosner v. Eden Township Hospital District*, 58 Cal.2d 592, 598 (1962) (in a case concerning retaliation against a physician for testimony against a hospital in a malpractice action, the court emphasized that "[i]n these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where considerations having no relevance to fitness are present").

The evidence cited by the trial court to disprove a conspiracy is actually completely consistent with a sham peer review, and the concerted action that underlies it. The lower court declared that:

> Plaintiff's evidence establishes that Conemaugh only began adverse action against Plaintiff following the death of EE, one of Plaintiff's patients at Conemaugh, more than three years after Plaintiff's problems at Lee arose. *Id.* at P 25. Finally, Plaintiff admits he never suffered adverse action at Windber and, in fact, voluntarily resigned from Windber. ... The evidence provided by Plaintiff demonstrates that Lee and Conemaugh were not acting in concert, *i.e.*, conspiring, but were actually acting quite independently.

Untracht, 2006 U.S. Dist. LEXIS 61896, at *48 (*A42*). But this sequence is precisely what one would expect when there is concerted action by disgruntled competitors to eliminate and destroy another physician through misuse of peer review. The competitors would not attempt to

revoke his privileges at multiple hospitals simultaneously. Rather, the revocations would occur seriatim, and merely three years between one peer review and another hardly disproves a connection.

Just as even the best trial lawyers lose many cases, the best surgeons have patients who die. The only way to avoid patient deaths is the same as the only way for attorneys to avoid losing trials: decline risky cases. But such a self-serving approach disserves the public and proves nothing about the competence of the professional. Dr. Untracht was, and is, an exemplary surgeon. The reliance by the court below on how "Conemaugh only began adverse action against Plaintiff following the death of EE, one of Plaintiff's patients at Conemaugh, more than three years after Plaintiff's problems at Lee arose" is entirely misplaced. Untracht, 2006 U.S. Dist. LEXIS 61896, at *48 (A42). This fact says nothing to dispel anticompetitive, concerted conduct against Dr. Untracht. The adversaries of Dr. Untracht, or of any surgeon specializing in high-risk cases, can be expected to wait until there is the inevitable patient death before trying improperly to remove him from the staff.

The court below was mistaken in declaring that "[p]rior to Plaintiff's voluntary withdraw[al] from the market, consumers had the same goods and services (an option for surgery performed by Plaintiff) available to them in the market as they had before the peer review actions taken by Lee and Conemaugh." Untracht, 2006 U.S. Dist. LEXIS 61896, at *66 (A52). In fact, patients were deprived the option of having surgery performed by the physician of their choice, Dr. Untracht, and at the hospitals of their choice, Lee and Conemaugh. This is no small or trivial deprivation. Plaintiffs were also deprived of the option of having surgery performed by their preferred physician at the hospital where certain other physicians, such as their family physicians, may have privileges. The supply of surgical services was plainly restricted by the revocation of Dr. Untracht's privileges,

and that constitutes antitrust injury under Section 1 of the Sherman Act.

Under the "Rule of Reason" analysis of antitrust, defendants should prevail only if their restraint of trade was reasonable. But there are factual issues concerning fairness of the procedures for the jury to decide here, as in other sham peer review cases. "The critical issue in Dr. Islami's motion for summary judgment becomes whether the procedures the defendants afforded to Dr. Islami were fair under the circumstances. ... The court believes that 'fairness based on the circumstances' is the paradigm jury question. The parties have diametrically opposed views on the issue and believe that the factual record viewed as a whole supports their position. **This is an issue for the jury to decide.**" *Islami v. Covenant Medical Ctr.*, 822 F. Supp. 1361, 1374 (N.D. Iowa 1992) (emphasis added).[1]

In sum, revocation of hospital privileges does confer antitrust standing and does constitute antitrust injury, and the court below erred in holding otherwise. The revocation of privileges also interrupts and terminates the physician's practice at the hospital used by many of his current and potential patients. The very nature of peer review is concerted action and restraint of trade. The only issue below is whether the restraint of trade in the form of revocation of Dr. Untracht's privileges was reasonable, an issue the lower court failed to reach. Its opinion failed to adequately address the lack of merit in the allegations against Dr. Untracht, and the insufficient

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[1] As explained more fully in AAPS's Statement of Interest, see supra pp. 2-3, Dr. Untracht treated more sickly patients than his colleagues did, yet Dr. Untracht had complication rates as low or lower than his competitors. And while the court below pointed out a patient death among Dr. Untracht's thousands of cases, his patient mortalities were actually statistically less than expected. Simply put, Dr. Untracht was providing superior care not otherwise available in his community, and the elimination of him from the market hurts the sickest patients.

basis for revoking his privileges. A remand is necessary for the lower court to address these central issues.

II. The Use of the National Practitioner Data Bank by Defendants Constituted State Action.

For most physicians, including Dr. Untracht, the revocation of hospital privileges triggers the federally mandated, career-ending adverse report in the National Practitioner Data Bank. This constitutes sufficient "state action" to satisfy the claim under Section 1983. 42 U.S.C. § 1983.[2] The court erred in dismissing all of plaintiff's claims under free speech, due process and equal protection based on a lack of state action.

The trial court correctly restated the test for state action, but failed to apply it to the use of a federal database. Simply put, "liability attaches to those wrongdoers who 'carry a badge of authority of a [s]tate and represent it in some capacity.'" *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *72 (*A55-56*) (quoting *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988)). The federally mandated National Practitioner Data Bank confers that "badge of authority" on the defendant hospitals to destroy a physician by branding him as substandard through the Data Bank. Put another way, the "symbiotic relationship" test for state action has been met when entities are given the special authority to ruin physicians through use of a federal database. In such a context the state has "insinuated itself into a position of interdependence" with the defendants, so as to be considered a joint participant with them and thereby trigger state action. *Burton v. Wilmington Parking Auth.*, 365

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[2] In *Bivens vs. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court extended Section 1983 type of liability to agents of the federal government.

U.S. 715, 725 (1961). *See also Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) (finding state action because "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'");

Federal law mandates reporting of the summary suspension to the Data Bank for nationwide distribution. *See* 42 U.S.C. § 11133(a), 11134(b), 45 C.F.R. §§ 60.1, .2, .7-.9. This federally required reporting, along with the state regulatory scheme governing the hospital proceeding, is sufficient nexus for state action. *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 507 (2002) (finding state action "when the state provides significant encouragement for the activity") (citing *Brentwood Acad.*, 531 U.S. at 296).

Although the court below addressed an argument about the Data Bank in the context of state action, it did not fully consider the power of the state that the Data Bank confers on hospitals with respect to the reputation of individual physicians. The Data Bank has an effect on reputation similar to that of a criminal indictment, which surely is state action. The Data Bank possesses this awesome power not due to freedom of speech or the press, but solely because the federal government

established it and mandates its use. The Data Bank is equivalent to the grand jury, which is composed of private citizens, when it announces an indictment. The hospitals play the role of a prosecutor, who does not need be an actual employee of the state to be a state actor. There, as here with HCQIA, state action exists because the defendant possessed power by law (HCQIA reporting) and this is made possible because the defendant is cloaked with the authority of state law (others, such as physicians and individuals, cannot report to the Data Bank). *See Groman v. Twp. of Manalapan*, 47 F.3d 628, 639 n. 17 (3d Cir. 1995).

Defendants cannot have it both ways, such that they exploit the state-mandated power of the Data Bank but then simultaneously ignore the procedural protections established in HCQIA, which established the Data Bank. By choosing to file an adverse and career-ending report about Dr. Untracht with the Data Bank, the defendant hospitals became state actors with respect to Dr. Untracht's reputation. HCQIA confers immunity on hospitals that performed the underlying peer review in good faith and with reasonable procedures. A remand is necessary here for the lower court to determine if the hospitals complied with all of HCQIA, or simply exploited the ability to use the Data Bank without utilizing the fair procedures.

All indications are that the hospital affirmatively violated the procedural guidelines of HCQIA, yet insisted on filing an adverse report to the Data Bank anyway. The transcript of the Joint Committee of the Board of the Medical Staff of defendant UPMC Lee Regional Hospital, dated May 27, 2003, illustrates how its committee did not want to hear any criticism of its view concerning Dr. Untracht. The Chairman of the Board of Trustees of defendant UPMC Lee Regional Hospital, Mr. Gardill, insisted that Dr. Untracht should not even be allowed to respond to the allegations leveled against him! Here was the exchange:

MR. GARDILL: ...We are not looking for you to criticize our report....

DR. UNTRACHT: The new evidence I wanted to provide you won't let me provide. You are not allowing me to call witnesses, so I can't put on any new evidence."

DR. UNTRACHT: ...Now you are saying that, you know, I can't produce my own experts who are going to state facts about what they think about the situation and to express

factual reasons why they think it is not appropriate for the hospital to be taking the action that they recommend. That is what they are going to testify about....And it is – to not be allowed to call witnesses, I think, that is, you know, that is just a little extreme.

MR. GARDILL: Okay. We can certainly take that under advisement....

DR. UNTRACHT: If I can just say, since this is a proceeding, I should be allowed to respond to the things that Mr. Federowicz [the hospital's attorney] mentioned.

MR. GARDILL: **I don't see a need for that.**

DR. UNTRACHT: I mean, I do, but I think it is just in fundamental fairness the person that starts gets to have the last word in proceedings like this, but you are moderating the proceedings and if you refuse it, well, then fine. I think – I just want it to be on the record.

MR. GARDILL: **I am going to refuse it at this point.**

(Lee Transcript, May 27, 2003, pp. 16-20) (emphasis added). The hospital's executive committee then decided Dr. Untracht's fate based on only one surgeon's recommendation, without Dr. Untracht being told why the reviewing physician made the adverse recommendation. (*A353*)

Plaintiff Dr. Untracht is entitled to proceed under Section 1983 for this flagrant violation of basic due process, once state action is recognized here. A remand on the grounds of Section 1983 is appropriate.

III. Adherence to Due Process with Respect to Hospital Privileges Hearings is Essential to Patient Safety.

In recently affirming a jury verdict in favor of a physician against hospital administrators in the *Springer* case, this Circuit framed the issues based in part on our amicus brief:

> [T]he Association of American Physicians and Surgeons, argues that the issue transcends the relationship between the parties and instead impacts thousands of patients damaged as a result of hospital errors, incompetence, wrongdoing, and cover-ups.

Springer v. Henry, 435 F.3d 268, 271 (3d Cir. 2006). The chilling effect of a sham peer review is undeniable: destroy the career of one physician, and hundreds or thousands of physicians will refrain from speaking out or competing against the perpetrators.

Without meaningful judicial review of sham peer review, the hospital industry will remain in the dark ages replete with archaic techniques, rampant errors, incompetence, wrongdoing and cover-ups. Hospitals reportedly kill more people in America than tragic fires, handguns, car accidents, and other familiar calamities. The *Christian Science Monitor* reported that "about 1 of every 200 patients admitted to a hospital died because of a treatment mistake ... [which] was more ... than died in 1998 from highway accidents (43,458), breast cancer (42,297), or AIDS (16,516)." It then added that some experts think this number of deaths due to hospital misconduct "was almost certainly far too low." Gregory M. Lamb, "Fatal Errors Push Hospitals to Make Big Changes," *Christian Science Monitor* 14 (July 8, 2004). The best way to reduce these errors is to end anticompetitive conduct at hospitals, so that the very best quality can rise to the top. But

as long as sham peer review is allowed, the benefits of full competition will never be realized. For example, the most effective way to minimize the number of packages lost by Federal Express is to facilitate robust competition by UPS and DHL. Errors at Federal Express would skyrocket if it could destroy UPS and DHL in a manner similar to the one that defendants apparently used here to destroy Dr. Untracht.

A study by Health Grades, Inc., estimates that medical errors in American hospitals "contributed to almost 600,000 patient deaths over the past three years, double the number of deaths from a study published in 2000 by the Institute of Medicine." Paul Davies, "Fatal Medical Errors Said To Be More Widespread," *Wall Street J.* D5 (July 27, 2004). Harvard Professor Lucian Leape has written that "[i]n most industries, defects cost money and generate warranty claims. In health care, perversely ... physicians and hospitals can bill for the additional services that are needed when patients are injured by their mistakes." *Leape, supra*, at 2388. But when physicians fear sham peer review like what happened here whenever they compete or complain, misconduct will reign supreme.

Retaliation against physicians, as alleged by Dr. Untracht here, is a growing problem. In one study, nearly 25% of physicians who reported concerns with patient care suffered threats to their jobs. Scott Plantz, M.D., *et al.*, "A National Survey of Board-Certified Emergency Physicians: Quality of Care and Practice Structure Issues," 16 *Am. J. of Emerg. Med.* 1, 2-3 (Jan. 1998). Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series beginning Oct. 26, 2003, entitled "Cost of Courage."[3] His articles showed how retaliation occurs nationwide, describing in detail the experiences of 25 physicians and a nurse, who suffered

[3] http://www.post-gazette.com/pg/03299/234499.stm

from actions adverse to their careers after they tried to improve care at their respective institutions.

Dr. Harry Horner is a physician who had to fight all the way to the Supreme Court of his State of Virginia to obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187 (2004). Dr. Horner was exposing the poor care of patients when an administrator at Western State Hospital charged him with violating another employee's right to confidentiality. The administration of Dr. Horner's hospital added charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a wound on a patient's foot. *See* Bob Stuart, "Court Rules for Whistleblower," *News Virginian* (June 16, 2004). Such pretextual allegations have become common, and it is essential for there to be meaningful judicial review of the abuses.

Like Drs. Springer and Horner, Dr. Untracht was a whistleblower. The court below acknowledged that Conemaugh revoked his privileges entirely for his communications with his patient's family. *Untracht*, 2006 U.S. Dist. LEXIS 61896, *25 (*A29*). Physicians like these must be able to speak freely without fear of retaliation in the form of a sham peer review. "It can hardly be doubted that conditions at a state mental hospital are matters of considerable public concern on which citizens ... ordinarily have the right to comment freely. And it is equally clear that defendants' interest in allaying the anxieties of some of their employees is, under the Pickering balancing test, totally insufficient to outweigh [a nurse's] interest in speaking freely about Haverford State Hospital." *Commonwealth of Pa. ex rel Rafferty v. Philadelphia Psychiatric Ctr.*, 356 F. Supp. 500, 507-08 (E.D. Pa. 1973).

This Circuit has a long history of protecting whistleblowers against retaliation. In *Baldassare v. New Jersey*, the plaintiff, a law enforcement investigator, was

demoted and eventually fired after he helped conduct an investigation into criminal allegations against two members of the Prosecutor's Office. 250 F.3d 188, 192-93 (3rd Cir. 2001). The district court granted summary judgment for the defendants on the plaintiff's claim for violation of his rights by not allowing "'him to exercise his freedom of speech in speaking out about various public issues.'" *Id.* at 194. On appeal, this Court reversed the lower court by holding "that Baldassare's expression in his investigation is constitutionally protected." *Id.* at 200. This Court's decision was grounded in the fact that the plaintiff's "investigation involved a matter of public concern" and "the state has failed to establish its interest outweighed its employee's." *Id.* This Court also rejected the defendants' claim of qualified immunity noting that "as of 1982 the law was 'clearly established' that a public employee could not be demoted in retaliation for exercising his rights under the first amendment." *Id.* at 201.

The impact of allowing sham peer review is severe. While the hospital benefits economically from eliminating outspoken physicians by claiming they are "disruptive", the public pays an enormous price indeed. Lives are lost. Establishing quality control of the delivery of medical care may be economically harmful to the hospital, but essential to the public's safety and economics.

This Circuit again sided with a whistleblower in *Czurlanis v. Albanese*, where it held that plaintiff's free speech rights "were violated as a matter of law." 721 F.2d 98, 99 (3rd Cir. 1983). The plaintiff worked as a mechanic for Union County and was suspended twice without pay and frequently transferred after he spoke at public Board meetings concerning "inefficiency, false reports, duplication, and unnecessary work on and parts for vehicles under the jurisdiction of the Division of Motor Vehicles." *Id.* at 100. In concluding that the plaintiff's "speech was protected under the First Amendment," the Court took into account the fact that "there is no evidence that the relationship between Czurlanis and his immediate supe-

riors was seriously undermined or that the operations of the Division of Motor Vehicles were disrupted." *Id.* at 106-07. The Court also noted that "the defendants [did not] contend that Czurlanis' statements 'have in any way impeded [the] performance of his daily duties.'" *Id.* at 106-07 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

Other courts have held likewise. In *Mangieri v. DCH Healthcare Authority,* the 11th Circuit held that the plaintiff "is not barred . . . from asserting claims for the alleged violation of his First Amendment rights in a suit under § 1983." 304 F.3d 1072, 1076 (11th Cir. 2002). In that case, the plaintiff medical doctor "began receiving complaints from the Authority regarding the quality of anesthesia services provided" by his company after he "opposed a proposal by the Authority." Id. at 1073-74. Subsequently, the defendant Authority told the plaintiff that they would not renew his contract when it expired at the end of that year. Id. at 1074. There the district court had incorrectly relied on the U.S. Supreme Court's decision in Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996), in ruling for the defendant. In vacating the district court's decision, the 11th Circuit refused to "conclude, as the district court did, that the absence of an automatic renewal provision in the 1998 contract prevented the non-renewal of that contract from constituting a 'termination' of a pre-existing commercial relationship." Mangieri, supra, at 1075.

In Jones v. Memorial Hosp. System, the plaintiff, a nurse employed by the defendant, wrote an article, which was printed in a local paper, "critically describing the conflict between the wishes of terminally ill patients and their families and the orders of the attending physicians." 677 S.W.2d 221, 223 (Tex. App. 1 Dist. 1984). After the hospital fired her, the plaintiff brought an action against them for infringing her free speech rights under the Texas Constitution. Id. The Court looked to "federal first amendment cases for guidance." Id. at 224. The Texas

Court stated that "the plaintiff may still assert her claim for reinstatement if the hospital's decision was grounded upon the plaintiff's exercise of her constitutionally protected first amendment freedom of speech." Id. at 225. Since the hospital was technically privately owned, the Court remanded the case to determine whether the state action doctrine applied to the hospital. Id. at 225-26. A remand is appropriate here also.

CONCLUSION

The decision below should be reversed and remanded.

Respectfully submitted,

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Dated: December 14, 2006

CERTIFICATION OF BAR MEMBERSHIP

The undersigned herewith certifies that he is a member of the Bar of the United States Court of Appeals for the Third Circuit, having been admitted on motion of Richard F. Collier, Jr., on March 12, 2003.

By: /s/ Andrew L. Schlafly
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Dated: December 14, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Steven H. Untracht, M.D. v. Erden Fikri, M.D., et al., No. 06-4221

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I, Andrew L. Schlafly, counsel for amici curiae Association of American Physicians and Surgeons, Inc. (AAPS) does hereby certify that the text of this brief in electronically filed form is identical to the text of the paper form and that the electronically filed brief has been checked for virus content using an updated McAfee-powered antivirus scanner supplied by AOL. The undersigned hereby certifies that on December 14, 2006, he caused the original and nine copies of the attached brief to be delivered by overnight commercial carrier to:

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